APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 876

EDDIE M. HARRISON, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 25, 1967
CERTIORARI GRANTED DECEMBER 4, 1967

Supreme Court of the United States

OCTOBER TERM, 1967

No. 876

EDDIE M. HARRISON, PETITIONER

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UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on February 25, 1960,
Sworn in on March 1, 1960

Criminal No. 365-'60
Grand Jury No. 427-60

Violation: 22 D.C.C. 2401
(Murder in the First Degree)
22 D.C.C. 2401
(Murder in the First Degree—Killing
while perpetrating the crime of robbery)

THE UNITED STATES OF AMERICA

v.

EDDIE M. HARRISON, ORSON G. WHITE,
JOSEPH R. SAMPSON

INDICTMENT—Filed April 19, 1960

The Grand Jury charges:

On or about March 8, 1960, within the District of Columbia, Eddie M. Harrison, Orson G. White and Joseph R. Sampson, purposely and with deliberate and premeditated malice, murdered George H. Brown by means of shooting him with a shotgun.

SECOND COUNT:

On or about March 8, 1960, within the District of Columbia, Eddie M. Harrison, Orson G. White and Joseph R. Sampson, unlawfully and feloniously did murder George H. Brown by means of shooting him with a shotgun, while attempting to perpetrate the crime of robbery.

/s/ Oliver Gasch
Attorney of the United States in
and for the District of Columbia.

A TRUE BILL:

/s/ William E. W. Howe
Foreman.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 365-60

UNITED STATES OF AMERICA

vs.

EDDIE M. HARRISON, ET AL., DEFENDANTS

Washington, D. C.
October 5, 1960.

The above-entitled cause came on for further hearing before THE HONORABLE BURNITA SHELTON MATTHEWS, United States District Judge, at 10:00 o'clock, a.m.

APPEARANCES:

FREDERICK G. SMITHSON, ESQ., Asst. U.S. Dist. Atty.
For the Government.

PERRY W. HOWARD, ESQ.,
For Defendant Harrison.

L. A. HARRIS, ESQ.,
For Defendants White and Sampson.

* * * *

THE COURT: * * *
All right, well, there being no opposition, I will grant the motion. Count 1 is dismissed.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 365-60

Charge First Degree Murder

UNITED STATES

vs.

1—EDDIE M. HARRISON, DEFENDANT

PLEA OF DEFENDANT—Filed April 22, 1960

On this 22nd day of April, 1960, the defendant Eddie M. Harrison, appearing in proper person and by his attorney Perry W. Howard, being arraigned in open Court upon the indictment, the same being read to him, pleads not guilty thereto.

The defendant is remanded to the District Jail.

By direction of
RICHMOND B. KEECH
Presiding Judge
Criminal Court # 1

HARRY M. HULL, Clerk

By /s/ W. G. Dodd
Deputy Clerk

Present:

United States Attorney

By VICTOR CAPUTY
Assistant United States Attorney

T. O'NEAL
Official Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 365-60

UNITED STATES OF AMERICA

v.

EDDIE M. HARRISON, ORSON G. WHITE,
JOSEPH R. SAMPSON

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER—Filed October 4, 1961

This matter came on for hearing before me on September 14, 1961, on orders from the United States Court of Appeals of the District of Columbia Circuit as to each of the three defendants, said orders dated July 21, 1961, with direction by the United States Court of Appeals to entertain a motion by each defendant to vacate and set aside judgment and award a new trial provided that such motion is filed on or before July 31, 1961. Pursuant to such orders, this hearing was duly held and the following constitutes the findings of fact, conclusions of law and order of this Court.

STATEMENT OF FACTS

1. The defendants, Eddie M. Harrison, Orson G. White and Joseph R. Sampson, were indicted on April 19, 1960, in a two-count indictment, charging murder in the first degree, a violation of Title 22, D. C. Code, Section 2401.

2. The defendant Eddie M. Harrison was represented by Mr. Perry W. Howard, a member of the bar of this Court and since deceased. The defendants Orson G. White and Joseph R. Sampson were represented by a person who indicated he was "L. A. Harris" and who entered his appearance on behalf of the defendant Sampson on April 29, 1960, and on behalf of defendant White on September 14, 1960. This indictment came on for trial on September 26, 1960, resulting in a verdict of guilty

on Count Two of the indictment on October 19, 1960, before this Court.

3. The defendant Eddie M. Harrison was represented throughout all preliminary proceedings, the course of the trial and the verdict of the jury by Mr. Howard. A motion entitled "Motion for New Trial and Arrest of Judgment" was filed on behalf of all defendants by the person represented to be L. A. Harris and by Perry W. Howard. However, Mr. Howard died on February 1, 1961, prior to argument. Subsequently, at the request of the defendant Eddie M. Harrison, the person of the supposed L. A. Harris was appointed by this Court to represent the defendant Harrison and to argue the motion for new trial and arrest of judgment on his behalf as well as that of the defendants White and Sampson. This motion was heard and subsequently denied on March 27, 1961.

4. Each of the defendants was sentenced on April 21, 1961, to death by electrocution. The defendants' applications to proceed on appeal without prepayment of costs was granted on April 21, 1961. While these appeals were pending, information was brought to the attention of the United States Attorney's office for the District of Columbia that the purported attorney for the defendants, utilizing the name of L. A. Harris, was not the person of Lawrence Archie Harris, a duly qualified and admitted member of the Bar of the District of Columbia, but in fact was an impostor, who fraudulently used the name of "L. A. Harris" and falsely represented himself to be the real Lawrence Archie Harris.

5. As reflected in several orders in this case from the United States Court of Appeals, *supra*, these facts were brought to the attention of the Court of Appeals in the instance of each defendant and resulted in the aforementioned orders.

6. The defendant Harrison is now represented in this Court by Jacob N. Halper, Esq.; the defendant White by Ross O'Donoghue, Esq.; the defendant Sampson by Daniel M. Singer, Esq., pursuant to appointment by former Chief Judge Pine on July 31, 1961.

It is noted that by the aforesaid orders of the Court of Appeals, *supra*, and pursuant to Rule 39a of the Fed-

eral Rules of Criminal Procedure, this Court has jurisdiction to consider, at the direction from the Court of Appeals, a motion by each defendant to vacate and set aside judgment and to award a new trial provided such a motion was filed on or before July 31, 1961. Pursuant to this order, each counsel for the three defendants filed an appropriate motion. The United States Attorney for the District of Columbia, in response to said motions to set aside judgment and to award a new trial, filed a statement of facts relative to said motions as to each defendant on or about August 4, 1961, wherein the government indicated to the Court that should the defendants White and Sampson affirmatively request, in accordance with the order of the Court of Appeals, that this Court vacate and set aside judgment and award a new trial, it was the government's position that it would interpose no objection to such a motion. With respect to defendant Harrison, the government initially filed such a statement, and subsequently filed a supplemental statement of facts relative to the motion to vacate and set aside judgment and grant a new trial as to the defendant Harrison alone. This supplemental statement was filed on September 12, 1961, wherein it was the position of the government that the Court should deny such a motion on behalf of the defendant Harrison as he was represented by competent and approved counsel, Mr. Perry W Howard, throughout all proceedings of the trial including the filing of a motion for arrest of judgment and a new trial.

7. This matter came on for hearing before this Court on behalf of each defendant on September 14, 1961, at which time counsel for all three defendants indicated that they were appointed to represent their individual defendants on the last day wherein such a motion, as contemplated by the order of the Court of Appeals, could be filed and each counsel filed such a motion in order to protect the interest of his individual defendant without consultation with his defendant. However, each counsel then stated that subsequently he had had the opportunity to confer with his defendant and that each defendant informed his counsel that he specifically did not and would not move the Court, orally or in writing, to vacate and

set aside judgment and award a new trial but that should this be the decision of the Court, each defendant would accept it.

8. On oral argument, with respect to the position indicated by each defendant relative to a motion to vacate and set aside judgment and award a new trial, the government opposed such a motion on the ground that the order of the Court of Appeals specifically limited this Court to consider such a motion when filed by a defendant and that should this be done without his consent, as indicated by each counsel for his individual defendant, a substantial issue of former jeopardy would be raised at the second trial.

CONCLUSIONS OF LAW

1. This Court has before it for consideration an order of the Court of Appeals for the District of Columbia Circuit, as to each of the three defendants, which was filed on July 21, 1961, in the United States Court of Appeals for the District of Columbia Circuit, ordering that this Court entertain a motion by the defendant in each instance to vacate and set aside judgment and to award a new trial provided such a motion is filed on or before July 31, 1961.

2. That the supervision and control of the proceedings on appeal as to each defendant in Criminal Case No. 635-60 resides with the Court of Appeals for the District of Columbia Circuit pursuant to Rule 39a of the Federal Rules of Criminal Procedure, and that this Court has jurisdiction to consider any matters arising therein solely in accordance with the order or directions to the District Court with regard to a specific motion as outlined in said order.

3. That the motions heretofore filed by counsel for each defendant were done without the consent and not in accordance with the wishes of each defendant, as indicated in Court on September 14, 1961.

4. That the motions heretofore filed by counsel for each defendant must be treated by this Court as withdrawn.

5. That there is not now pending before this Court, and that there will not be submitted to this Court, any

motion on behalf of the defendants herein to vacate and set aside judgment and to award a new trial, within the terms of the order of the United States Court of Appeals dated July 21, 1961.

6. That the purpose of the order of the Court of Appeals referred to above cannot further be carried out in the face of the unwillingness of the defendants herein to file the motions contemplated by that order, and that the case should be resubmitted to the United States Court of Appeals for further proceedings.

Wherefore, it is this 4th day of October, 1961,

ORDERED that each motion filed on behalf of each individual defendant is hereby considered as withdrawn and there being no valid motions before this Court, no order may be made by this Court relative to the merits, if any, of a motion to vacate and set aside judgment and award a new trial.

/s/ Burnita Shelton Matthews
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 365-60

UNITED STATES OF AMERICA

v.

EDDIE M. HARRISON

JUDGMENT AND COMMITMENT (REV. 7-52)—
Filed June 18, 1963

On this 14th day of June, 1963 came the attorney for the government and the defendant appeared in person and [1] by his attorney, George J. Thomas, Esquire

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] not guilty and a verdict of guilty of the offense of

FIRST DEGREE MURDER

as charged [3]

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] the term of his natural life.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United

States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Alexander Holtzoff
United States District Judge

.....
Clerk

The Court recommends commitment to:[6] a Federal institution of the maximum security type.

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appoined by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17991

EDDIE M. HARRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 17992

ORSON G. WHITE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 17993

JOSEPH R. SAMPSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court
for the District of Columbia

(Opinions released December 7, 1965, coincident with opinion on rehearing en banc.)

Mr. Alfred V. J. Prather, with whom *Mr. George J. Thomas* (both appointed by this court) was on the brief, for appellant in No. 17991. *Messrs. Charles A. Miller* and *Thomas B. Donovan* were also on the brief for appellant in No. 17991.

Mr. Thomas H. Wall, with whom *Mr. Ronald N. Cobert* (both appointed by this court) was on the brief, for appellant in No. 17992.

Mr. Monroe Oppenheimer (appointed by this court) with whom *Mr. I. William Stempil* was on the brief, for appellant in No. 17993.

Mr. William H. Willcox, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney at the time the brief was filed, and *Frank Q. Nebeker* and *Frederick G. Smithson*, Assistant United States Attorney, were on the brief, for appellee. *Mr. B. Michael Rauh*, Assistant United States Attorney at the time the record was filed, also entered an appearance for appellee in No. 17991.

After the opinions of the judges in the sitting division had been considered, the court *sua sponte* ordered rehearing en banc as to one issue, as hereinafter appears.

PER CURIAM: These appeals from judgments of conviction in the District Court came on to be heard before a division of the court consisting of Senior Circuit Judge Wilbur K. Miller and Circuit Judges Washington and Danaher. The opinions of the respective members of that division require reversal of the convictions, and the order of this court in that result is unanimous.

The issue discussed in part III, C of Judge Danaher's opinion, was made the subject of a rehearing en banc. On June 1, 1965, the court entered the following order with respect to *Harrison* v. *United States*, No. 17991:

ORDER

It is ORDERED *sua sponte* by the court *en banc* that the above-entitled case shall be reheard by the court *en banc* on Tuesday, June 15, 1965. The rehearing shall be limited to the issue of the admissibility of the oral admissions of Harrison made at the District of Columbia Jail on March 21, 1960. Cf. *Harling* v. *United States*, 111 U.S. App. D.C. 174, 295 F.2d 161 (en banc, 1961).

Per Curiam

Dated: June 1, 1965

Although a majority of the sitting division would have considered that Harrison's oral statements as mentioned in the order might have been received in evidence at a new trial, a majority of the court en banc has ruled otherwise as more fully appears in the opinions that follow.

The convictions are reversed.

So ordered.

Dated: December 7, 1965

The opinions of the judges of the original division follow.

Before WILBUR K. MILLER, *Senior Circuit Judge*, and WASHINGTON* and DANAHER, *Circuit Judges.*

DANAHER, *Circuit Judge*: An indictment filed April 19, 1960 charged the appellants with murder in the first degree, the first count alleging premeditated murder, and the second charging that on or about March 8, 1960, they murdered one George H. Brown "by means of shooting him with a shotgun, while attempting to perpetrate the crime of robbery." The first count was dismissed. The jury on May 8, 1963 found all three appellants guilty of "felony-murder" and recommended life imprisonment for each.[1]

About 9 A.M. on March 8, 1960, the victim Brown, a gambler, answered a knock at the front door of his house at 1713 Fourth Street, N. W., here in the District. He was met by a blast from a sawed-off shotgun which Harrison had concealed under his trench coat. The gunshot minutely fractured Brown's face on the right side, destroyed the right eyeball and macerated his brain.

* Circuit Judge Washington became Senior Circuit Judge on November 10, 1965.

[1] The sentence was authorized by D. C. CODE § 22-2404 (Supp. IV; 1965). As to background re the amendment, see Jones v. United States, 117 U.S.App.D.C. 169, 327 F.2d 867 (*en banc*, 1963); Coleman v. United States, 118 U.S.App.D.C. 168, 334 F.2d 558 (*en banc*, 1964).

Brown's body fell against the front door.[2] White and Harrison who had gone to Brown's house intending to rob him, thereupon turned and ran to a waiting get-away car driven by Sampson. The three men then escaped. Additional facts will be interpolated as we turn to the grounds upon which appellate relief is sought.

I

The appellants were first convicted on October 19, 1960, and on April 21, 1961 had been sentenced to death by electrocution while represented by an impostor, one Daniel Jackson Oliver Wendel Holmes Morgan.[3] The appellants now assert that they were twice placed in jeopardy since this court, *sua sponte*, and over objections by the appellants had ordered a second trial. We do not agree, for in legal effect the so-called "first" trial was a nullity, as will be realized from our noting the bizarre circumstances which impelled our order.

Morgan was not an attorney, but an ex-convict who had taken the name of an absentee attorney, L. A. Harris, who was in fact a member of the bar. Morgan, alias Harris, had purported to represent White and Sampson throughout the first "trial" in September and October, 1960. Harrison then was represented by an attorney who later died whereupon Morgan undertook also to represent Harrison. After the judgment of conviction and sentence, an appeal for all three accused had been brought to this court. While that "appeal" was pending, the Morgan masquerade, was discovered. When informed of such facts, and completely satisfied that the appellants had been denied their right to the effective assistance of counsel, we remanded the case to the District Court that it might entertain a motion for a new trial.

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[2] Police who shortly responded discovered that the front door had become locked, with the body of the "huge" Brown against the door. A large "roll" of money was on his person.

[3] Morgan was later convicted of various offenses more particularly enumerated in our opinion affirming his conviction, Morgan *v.* United States, 114 U.S.App.D.C. 13, 309 F.2d 234 (1962), *cert. denied*, 373 U.S. 917 (1963).

But new counsel then representing the appellants refused to move for a new trial, undoubtedly on the assumption that a double jeopardy plea might survive the procedural impasse. This court thereupon declined to further any such stratagem; we directed that the judgments of conviction be vacated. We had concluded under all the circumstances that there was a manifest necessity for our action lest the ends of public justice be defeated.[4] Surely these accused in a capital case were entitled to a "full defense by counsel learned in the law,"[5] rather than to representation by Morgan. Granting that "each case must turn on its facts,"[6] we found the reasons here "compelling"[7] for the action we directed.

The Government then went forward with the trial leading to the convictions now under review. The plea of former jeopardy must fail.

II

Appellants contend they were denied their right to a speedy trial. Following their first appeal, they could have been tried in the Fall of 1961 if they had followed this court's original suggestion that they move for a new trial. They refused to do so, and as noted, *supra*, this court, *sua sponte*, was obliged to reinstate the appeals and, on June 12, 1962, to enter an order vacating the original judgments of conviction. That order was filed in the District Court July 3, 1962. The District Court then assigned the case for trial on October 17, 1962. By that date there had been hearings on motions of various court-appointed counsel for leave to withdraw; Harrison had no attorney; Attorney David, appointed October 30, 1962, thereafter sought a continuance contending that he had no transcript of the first trial; Harrison then moved

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[4] United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); cf. Scott v. United States, 91 U.S.App.D.C. 232, 202 F.2d 354, *cert. denied*, 344 U.S. 879 (1952) and cases cited.

[5] 18 U.S.C. § 3005 (1958).

[6] Downum v. United States, 372 U.S. 734, 737 (1963).

[7] Gori v. United States, 367 U.S. 364, 368 (1961).

that Attorney David be discharged; motions to dismiss on double jeopardy grounds had been filed and argued; in short, on one basis or other, the District Court was occupied with a series of defense motions, some purportedly of substance, some procedural, but all contributing to delay.

The unique problems stemming in the first place from Sampson's and White's having engaged the impostor Morgan gave rise to the several dilatory moves. No prejudice in fact was shown. Nor were the "circumstances" such as to deprive the appellants of constitutional rights.[8]

III

Our next inquiry involves inculpatory statements attributed to the respective appellants. We may first set forth briefly the evidence at hand as of the day of the crime.

Across from Brown's house on March 8, 1960 lived a Mrs. McCoy. Between 9 and 9:30 A.M., she heard "this loud noise go off" and ran into the street. She saw "two boys coming out" of Brown's house, and one of them "put something under his coat, a gun."

One Thomas Young had breakfast that morning at Keys' Restaurant. He sat in a booth with Brown until both left the restaurant about 9 o'clock. Then Brown entered his car. In the restaurant Young had seen a man[9] who was looking at him and Brown. He noticed that the man came from the restaurant as Young and Brown left the premises. He saw that man get into a black Buick car parked near the restaurant. Two other people were in the car. Within a short time Young learned of the attack upon Brown and called the police.

Such was the scanty evidence known to the police shortly after their gaining access to Brown's house and their discovery of his body wedged against the front door. Police investigation went forward immediately.

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[8] Smith v. United States, 118 U.S.App D.C. 38, 331 F.2d 784 (*en banc*, 1964), and cases therein considered.

[9] Later to be identified as Sampson.

Later that same day officers questioned these appellants concerning their possible connection with the crime. As the police sought information from Harrison, he told an officer his name and his address, and then added "I don't have to tell you anything else, you can go to hell." All three appellants then denied knowledge of the killing. After having been detained overnight, all three appellants were released.

A.

Some time in the afternoon of March 20, 1960, police went to Sampson's house looking for him but he was not there. About 6 P.M., Sampson telephoned to Headquarters and stated to Captain Daly that he understood the police had been looking for him and that he was then at home. Two officers were sent for him. They handcuffed Sampson and brought him to Headquarters. Questioned by Captain Daly, Sampson, commencing about 6 P.M., supplied answers which implicated White and Harrison but which likewise tended to exculpate himself. While Captain Daly was typing up a report of what Sampson had said, White was brought in and was told what Sampson had first said.

White replied "If that is what Sampson said, it is not true, you better talk to him some more." Throughout the evening of March 20, 1960 the questioning of White and Sampson proceeded until, commencing at about 10:30 P.M., Sampson orally submitted an amended version of the part he had played in the crime. Typing of his inculpatory statement commenced around 10:45 P.M. and was completed shortly before midnight. Sampson ultimately was booked at 1:30 A.M. on March 21, 1960. Asked if it was his "purpose in questioning Sampson" to obtain admissions relating to the crime, Captain Daly answered "Yes."

In like manner White at about 10:30 P.M. commenced a statement, the typing of which was completed by Detective Pixton around 11:45 P.M. Thereafter White accompanied the officers to premises at 1511 Newton Street, N. E. as police sought to locate the shotgun which White stated had been put down an incinerator. The gun was

not found, for the incinerator had been cleaned out before police reached the spot. White was booked at about 1:29 A.M. on the morning of March 21, 1960.

Not until later in the forenoon of March 21, 1960 were White and Sampson brought before the United States Commissioner.

At the trial the confessions by Sampson and White were received in evidence. The rule laid down in *Mallory* v. *United States* [10] has been deemed in some situations not to require exclusion of a voluntary confession forthcoming in the course of an essential investigation.[11] Had Sampson's presence and participation been voluntary, "it is well established that the *Mallory* rule is inapplicable." [12] But in light of various rulings which derived from the particular circumstances of yet other cases, the Government in this court conceded on brief that Sampson's confession should not have been received because of "the length of the interrogation that preceded the incriminating statements." We think because of the record here presented the same is true of White's confession. Under control of the police throughout the evening of March 20, 1960, he had been detained at Headquarters while being questioned; he was then after confessing taken out to where the gun had been disposed of, and was not finally booked until about 1:29 A.M. on the 21st. We think the situation as to White is clearly analogous to that disclosed in *Seals* v. *United States*,[13] and hence his confession also should have been excluded.

B.

Additionally, the Government offered in evidence statements taken from Sampson and White by jail classifica-

[10] 354 U.S. 449 (1957).

[11] See, e.g., United States v. Vita, 294 F.2d 524 (2 Cir. 1961), *cert. denied*, 369 U.S. 823 (1962); and Scarbeck v. United States, 115 U.S.App.D.C. 135, 152, 317 F.2d 546, 563 (1962), *cert. denied*, 374 U.S. 856 (1963), and cases there cited.

[12] Scarbeck v. United States, *supra* note 11.

[13] 117 U.S.App.D.C. 79, 81-82, 325 F.2d 1006, 1008-1009 (1963), *cert. denied*, 376 U.S. 964 (1964); cf. Naples v. United States, 113 U.S.App.D.C. 281, 284, 307 F.2d 618, 621 (*en banc*, 1962).

tion officers. At one time this court had thought that such statements might be received in evidence.[14] But a division of this court (one judge dissenting) has latterly held otherwise in *Killough* v. *United States*.[15] We deem ourselves bound to follow that ruling.[16]

It follows that the convictions of Sampson and White must be reversed on the ground that their confessions to the police and their statements to the jail classification officers should not have been received in evidence.

C.

A different situation is presented with respect to Harrison's oral admissions at the jail and his later written confession. He was not present at Headquarters when Sampson and White confessed. He was already in jail on March 21, 1960 under circumstances we may next describe. On March 19, 1960, one Edith E. Penn swore to a complaint in the Court of General Sessions where she charged Harrison with breaking and entering her apartment on March 18, 1960 and with the theft of $32 and various articles of personal property. Harrison waived hearing, and bail was fixed at $5,000. He was committed to jail to await grand jury action and was later indicted in Criminal No. 364-60. Also on March 19, 1960, Harrison had been convicted and sentenced to jail on three traffic charges growing out of violations on March 18, 1960. He had become 18 years of age on March 18, 1960 so that in neither of the foregoing cases had he been charged in the Juvenile Court, nor had he been charged with the Brown homicide in any court. Thus his incarceration on March 19, 1960 and over the subsequent period so far as is here relevant, was in no way related to the crimes involved in the instant case.

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[14] Tyler v. United States, 90 U.S.App.D.C. 2, 9, 193 F.2d 24, 31 (1951), *cert. denied*, 343 U.S. 908 (1952).

[15] 119 U.S.App.D.C. 10, 336 F.2d 929 (1964).

[16] Harrison's statement to a jail classification officer is likewise inadmissible, but the circumstances as to Harrison, generally, will be the subject of separate reference, *infra*, part III, C.

The record shows that about 7:30 A.M. on March 21, 1960, Captain Daly and two detectives brought Sampson and White to the jail. They filled out a visitor's request form seeking Harrison's consent to an interview and he agreed. Harrison then was brought by a jail attendant to the rotunda where the police told Harrison that Sampson and White had been charged with the murder of Brown, that they had told the complete story to the officers and had implicated him. Harrison asked: "Well, what did they tell you?"

Thereupon, addressing Harrison, Sampson told Harrison what *he* had said to the police. Likewise, White told Harrison what had been said in *his* statement and the part "that he said Harrison had played." Harrison then stated that what Sampson and White had said was true; "that he had fired the gun through the window; at the time he fired it White was standing on the steps behind him."

The officer then asked Harrison "if he wanted to make a complete statement as to the part he did play in this robbery and homicide and he said yes, that he would." Thereupon, Harrison narrated the development of the plan to rob Brown, the steps taken to effectuate that plan, and his arrangement to borrow a car. He told of his carrying a sawed-off shotgun under his coat, and of other particulars involved in his shooting of Brown. He claimed that as Brown had slammed the door in his face, the glass on the door had hit the shotgun which was thus discharged.[17] We need not supply other details. Harrison's oral admissions were properly received against him.

In the first place, there has been shown no fact of record even tending to establish that Harrison's admissions were not freely and voluntarily forthcoming. The

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[17] The Government did not contend that the actual discharge of the shotgun was other than accidental but argued, correctly, that even so, that fact was immaterial since the shooting occurred during the perpetration of a felony. Coleman v. United States, 111 U.S.App.D.C. 210, 214, 295 F.2d 555, 559 (*en banc*, 1961), *cert. denied*, 369 U.S. 813 (1962); cf. Wheeler v. United States, 82 U.S. App.D.C. 363, 165 F.2d 225 (1947), *cert. denied*, 333 U.S. 829 (1948).

Mallory rule which requires the exclusion of Sampson's confession and White's confession from being used in criminal proceedings against them is no bar to their telling Harrison what they had told the police. Here was no set of admissions by Harrison induced by police misrepresentation or fraud.[18] With a jail attendant present at all times, with no coercive questioning by police, with no suggestion of police duress, Harrison knew that the co-accused to his face had told the truth, and thus he offered his version of the crime. From other evidence in the case it is clear that Harrison definitely had on his mind the shooting aspect as distinguished from other phases. He told one Valentine that he had shot "Cider" Brown. He had told one Stevenson that he had gone to Brown's house to pawn the gun and that "the man slammed the door on the gun and the gun went off." As Professor Wigmore observed:

> "The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment, he will tell all, and tell it truly."[19]

In *Smith* v. *United States*,[20] this court held that the testimony of one Holman, an eyewitness to the crime, might be received in evidence against Smith even though Holman's identity had been learned during the illegal detention of Smith, as its source. We are satisfied that there was no error in receiving in evidence Harrison's oral admissions given in the presence of Sampson and

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[18] Cf. Hawkins v. United States, 81 U.S.App.D.C. 376, 158 F.2d 652 (1946), *cert. denied*, 331 U.S. 830 (1947). There police had informed the appellant that his relatives were being questioned.

[19] 3 WIGMORE, EVIDENCE § 851, at 319 (3d ed. 1940).

[20] 117 U.S.App.D.C. 1, 324 F.2d 879 (1963), *cert. denied*, 377 U.S. 954 (1964); and see Williams v. United States, 272 F.2d 822 (6 Cir. 1959), *cert. denied*, 364 U.S. 836 (1960); cf. Payne v. United States, 111 U.S.App.D.C. 94, 294 F.2d 723, *cert. denied*, 368 U.S. 883 (1961).

White, quite irrespective of the status of their own confessions.

Harrison additionally contends that his oral admissions at the jail were excludable because of our holding in *Harling* v. *United States*.[21] There we were concerned with the admissibility of damaging oral statements made by Harling while in police custody when he was seventeen years old and before the Juvenile Court had waived jurisdiction. He had admitted participation in the robbery after which he was returned to the Receiving Home to await hearing before the Juvenile Court. We observed that under the applicable statutes impairment of the *parens patriae* function must be avoided. This requires that admissions by a juvenile in connection with the noncriminal proceeding be excluded from evidence in the criminal proceeding." [22] We later explained that

> "The *Harling* case bars the Government from using against an accused in a criminal trial a confession or admission *officially obtained from him when he was a juvenile detained under the auspices of the Juvenile Court*, where the latter court has subsequently waived its jurisdiction and transferred the accused for trial to the District Court." [23] (Emphasis supplied.)

The "special practices" applicable to a juvenile underlay the *Harling* ruling, we observed, and evidence "directly or indirectly obtained through juvenile procedures" [24] became subject to exclusion, depending upon whether the procurement of that evidence was "sufficiently divorced from the juvenile procedures . . . ." [25]

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[21] 111 U.S.App.D.C. 174, 295 F.2d 161 (*en banc*, 1961).

[22] *Id.* at 177, 295 F.2d at 164. The Juvenile Court then was deemed to have original and exclusive jurisdiction of all cases and proceedings concerning a person under 21 years of age *"charged with having violated any law"* (emphasis supplied) prior to having become 18 years of age. D. C. CODE § 11-907 (1961).

[23] Edward v. United States, 117 U.S.App.D.C. 383, 384, 330 F.2d 849, 850 (1964).

[24] *Id.* at 385, 330 F.2d at 851.

[25] *Ibid.*

None of the considerations so outlined can here be discerned.[26] Harrison's statements were not elicited by virtue of the authority of the Juvenile Court or of any of its functionaries. Unlike Harling, Harrison had not in the language of the Code, been "charged with having violated" any law applicable to the Brown homicide, in the Juvenile Court or in any other court. Thus he was not disabled from talking as was Harling. Appellant's present contention carried to its logical end would have us say that if Harrison had been twenty years and eleven months of age when apprehended, his completely voluntary admissions must be excluded simply because they related to a crime committed when he was only ten days short of his eighteenth birthday. Our *Harling* decision requires no such absurd result, for neither its rationale nor the circumstances there considered can have application here.

Rather, confronted by his confederates in crime, he spontaneously submitted his own version of the affair. He even sought to exculpate himself to the extent possible and to ascribe the homicide to an accidental cause. Only after he had offered his explanation were the police in position to charge Harrison with the Brown offense. So it was that later on, in the afternoon of March 21, 1960, the homicide complaint was lodged against Harrison. The *Harling* case has no applicability to the issue before us, as the *Edwards* case makes clear, and the trial judge did not err in refusing to exclude Harrison's oral statements at the jail on the morning of March 21, 1960.

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[26] Here the court was not dealing with a "child." This man had become 18 years of age on March 18, 1960. He had gone through 11 grades in school. He was a completely wary adult who knew exactly what he was doing. He had told the officers following his arrest on March 8, 1960 that the only information he had to give them was his name and address and that he did not have to tell them anything else; "You can go to hell," he said. Even when confronted by Sampson and White he asked the officers "Well, what did they tell you?" Having heard from them personally, he went forward with his own version of the episode.

D.

A different position must be taken with reference to Harrison's written confession. Some hours after Harrison's early morning statements in the presence of Sampson and White, officers returned to the jail without the co-accused. The police then went back over the substance of Harrison's earlier interview and reduced his statements to writing. His confession so taken should have been excluded.[27] Harrison had not been presented before the Commissioner although he readily could have been on the basis of his earlier admissions.

Moreover, as had been the case with respect to Sampson and White, the Government introduced Harrison's statement to a jail classification officer. That statement likewise was erroneously received.[28]

IV

Other contentions pressed upon us have been fully considered but we deem them so lacking in substance that further discussion is not required. From what has been said it is clear that the convictions of all three appellants must be

Reversed.

WILBUR K. MILLER, *Senior Circuit Judge*, concurring: I join in Parts I and II of Judge Danaher's opinion and in his treatment of the *Harling* point urged on behalf of the appellant Harrison. There is room for doubt, I think, whether the confessions to the police at headquarters should have been excluded on *Mallory* grounds; but there is no doubt that under the holding of the second *Killough*

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[27] Cf. Killough v. United States, 114 U.S.App.D.C. 305, 315 F.2d 241 (*en banc*, 1962).

[28] Killough v. United States, *supra* note 15 and corresponding text, and see note 16 *supra*.

case,[1] the appellants' statements to the jail classification officers should not have been received in evidence.

I think it is a travesty on justice to reverse the convictions of these three murderers. Reversal is required, however, by the second *Killough* case which is controlling authority although it is, in my view, grossly wrong. So, I very reluctantly concur in the ultimate result.

WASHINGTON, *Senior Circuit Judge*: I concur in the result. I would add that in my view Harrison's confessions are barred by our decision in *Harling* v. *United States*, 111 U.S.App.D.C. 174, 295 F.2d 161 (en banc, 1961). Harrison was 17 years old when the present offense was committed, and 18 at the time of his interrogation at the jail. He was under the exclusive jurisdiction of the Juvenile Court with respect to that offense. See D.C.CODE § 11-907(1)(b)(1961)[1] Waiver of jurisdiction by the Juvenile Court occurred later. But at the time of the interrogation he was subject to the rule in *Harling*, and his confession was barred by that rule.

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[1] Killough v. United States, 119 U.S. App. D.C. 10, 336 F. (2d) 929 (1964), decided by Judges Washington and Wright, with Judge Danaher dissenting.

[1] "§ 11-907. Jurisdiction—Original and exclusive.

"1. *Children.*—Except as herein otherwise provided, the [Juvenile] court shall have original and exclusive jurisdiction of all cases and in proceedings:

* * * *

"(b) Concerning any person under 21 years of age charged with having violated any law, or violated any ordinance or regulation of the District of Columbia, prior to having become 18 years of age, subject to appropriate statutes of limitation."

ON REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17991

EDDIE M. HARRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided December 7, 1965

Mr. Alfred V. J. Prather, with whom *Messrs. George J. Thomas* (both appointed by this court), *Charles A. Miller* and *Thomas B. Donovan*, were on the brief, for appellant.

Mr. Frank Q. Nebeker, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, *Frederick G. Smithson* and *William H. Willcox*, Assistant United States Attorneys at the time the brief was filed, were on the brief, for appellee. *Mr. B. Michael Rauh*, Assistant United States Attorney at the time the record was filed, also entered an appearance for appellee.

Before BAZELON, *Chief Judge*, WILBUR K. MILLER, *Senior Circuit Judge*,* and FAHY, WASHINGTON,** DANAHER, BURGER, WRIGHT, MCGOWAN, TAMM, AND LEVENTHAL, *Circuit Judges*.

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* Sitting by authority of 28 U.S.C. § 46, as amended Nov. 13, 1963.

** Circuit Judge Washington became Senior Circuit Judge on November 10, 1965.

LEVENTHAL, *Circuit Judge*, with whom *Chief Judge* BAZELON and *Circuit Judges* FAHY, WRIGHT and MCGOWAN join: This court en banc, on its own motion, ordered rehearing limited to the issue of the admissibility of Harrison's oral admissions made March 21, 1960. Those admissions, made a few days after he turned eighteen, related to a criminal offense committed prior to his eighteenth birthday. The Juvenile Court Act expressly gives the Juvenile Court original and exclusive jurisdiction over all cases and proceedings involving persons under twenty-one years of age charged with having violated a law prior to having become eighteen years of age.[1] It was not until a week after his confession that the Juvenile Court exercised its statutory authority to waive jurisdiction over the offense. Under the governing rule laid down by this court, en banc, in *Harling* v. *United States*, 111 U.S. App. D.C. 174, 295 F.2d 161 (1961), the admissions made March 21

[1] For the pertinent provisions in effect in 1960, see Title 11, D.C. Code (1961):

§ 11-907. *Jurisdiction—Original and exclusive.*

1. *Children.*—Except as herein otherwise provided, the court shall have original and exclusive jurisdiction of all cases and in proceedings:

* * * *

(b) Concerning any person under 21 years of age charged with having violated any law, or violated any ordinance or regulation of the District of Columbia, prior to having become 18 years of age . . . .

§ 11-914. *Waiver of jurisdiction in case of felony—Transfer of case.*

If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases.

Following Public Law 88-241, Dec. 23, 1963, these provisions were transfered to §§ 1551 and 1553 of Title 11, D.C. Code. The changes made are not material to any point under discussion.

may not be received in evidence in the criminal proceeding in District Court.

The trial court considered this to be a close question, but admitted the confession on the ground that "the Harling case should be confined to its strict facts."[2] This was error. *Harling* establishes the broad principle that statements elicited from a minor in police custody at a time when he is subject to the original and exclusive jurisdiction of the Juvenile Court are not admissible against him in the event of a subsequent waiver of that jurisdiction and criminal trial in the District Court. *Harling* puts to one side, as do we, the case of spontaneous statements. What are involved here are statements secured by police questioning and confrontation.

The foundation stone of *Harling* is the opinion of Judge Prettyman in *Pee* v. *United States*, 107 U.S. App. D.C. 47, 274 F.2d 556 (1959), which stressed the non-criminal philosophy of the Juvenile Court Act.[3] Unfolding the consequences we pointed out in *Harling*:[4]

> *Pee* makes plain that from the moment a child commits an offense, "in effect he is exempt from the criminal law" unless and until the Juvenile Court waives its jurisdiction. During that period the juvenile rules govern; they allow detention for five days without a judicial hearing . . . .

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[2] The trial court also noted that admission of the confession gave defendant a right of review, while excluding the confession would leave the government without recourse for miscarriage of justice. It would be indefensible to transmute the defendant's right of appeal into an extra burden on close questions arising during trial. However, in this case the trial court made it clear that it was his opinion that the *Harling* objection, while a close question, and worthy of consideration, should be overruled.

[3] See 107 U.S.App.D.C. at 49, 274 F.2d at 558:

> In the event a child commits an offense against the law, the state assumes a position as *parens patriae* and cares for the child. Such a one is not accused of a crime, not tried for a crime, not convicted of a crime, not deemed to be a criminal, not punished as a criminal, and no public record is made of his alleged offense. In effect he is exempt from the criminal law.

[4] 111 U.S. App.D.C. at 176-77, 295 F.2d at 163-64.

> It is, of course, because children are, generally speaking, exempt from criminal penalties that safeguards of the criminal law, such as Rule 5 and the exclusionary *Mallory* rule, have no general application in juvenile proceedings. . . .
>
> . . . . These strict safeguards [i.e. "procedural safeguards observed in criminal proceedings"], however, are wholly inappropriate for the flexible and informal procedures of the Juvenile Court which are essential to its *parens patriae* function. To avoid impairment of this function, the juvenile proceeding must be insulated from the adult proceeding. This requires that admissions by a juvenile in connection with the non-criminal proceeding be excluded from evidence in the criminal proceeding.

The *Harling* opinion makes clear that the exclusion of admissions "in connection with the non-criminal proceeding" applies not only to statements made to Juvenile Court judges or attachés, but to all statements made at a time when he is subject to the exclusive jurisdiction of the Juvenile Court. The fact that Harling made his statement in the police station was not a reason for limiting the exclusionary rule. On the contrary, we expressly noted that "the problem is accentuated in cases, such as this one, where the admissions are extra-judicial, entirely unenvironed by any court protections." And we specifically rejected a solution which would make admissibility vary from case to case depending on a probing in each case of the capacity of the minor to understand and waive his rights.

Only a minority of jurisdictions use a jurisdictional line below the eighteen year level of our Juvenile Court Act.[5]

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[5] See Hearings on H. R. 6747 before Subcommittee No. 3 of the Committee on the District of Columbia, House of Representatives, 87th Cong., 1st Sess. 63 (1961).

Congress also used the eighteen year jurisdictional line in the Federal Juvenile Delinquency Act passed in 1938 (see 18 U.S.C. § 5031). That other legislatures were of like mind see e.g. Pa. Laws 1939, Acts Nos. 226, 227 (increasing age limit from sixteen to eighteen).

Proposals to reduce the age limit in the District law have not been approved.[6] The question presented by the teenager accused of serious crime is undoubtedly baffling, and there are no clear answers. Particularly vexing are the problems presented by the sixteen or seventeen year old adolescents precocious in criminal propensity. The problem of which of them should be waived [7] is of such breadth and complexity that the responsibility for the waiver determination was deliberately assigned to the judge of the Juvenile Court and not to the prosecutorial arm of the government.[8] The "full investigation" by the judge, speci-

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[6] The Judicial Conference of the District of Columbia Circuit unanimously resolved on November 24, 1959, "that the age limits stated in the Juvenile Court Act should not be lowered." See pp. 1235-36 *of Hearings on Juvenile Delinquency*, before the Subcommittee to Investigate Juvenile Delinquency of the Senate Judiciary Committee, 86th Cong., 1st Sess. (1960).

H.R. 6747, 87th Cong., 1st Sess., proposed lowering the maximum age of juveniles from eighteen to sixteen years. The bill was favorably reported by the Committee on the District of Columbia (H.R. Rep. No. 1041). However, although the bill passed in the House, S.486, containing no provision for lowering the age limits, was passed in lieu thereof by the Senate, agreed to by the House, and approved by the President on March 9, 1962. 108 Cong. Rec. 2945, 3874 (1962).

[7] Compare Commentary by the Committee on the Standard Juvenile Court Act of the National Probation and Parole Association relating to § 13 (Transfers) of the Standard Juvenile Court Act, 5 N.P.P.A.J. 353 (October 1959):

> It is true that some sixteen- and seventeen-year-olds, and even some younger, have strongly developed tendencies which render them impervious to the average juvenile or family court's services. Accordingly, it is necessary to authorize transfer to the criminal court. Of course, before such transfer is made the court should have sufficient knowledge of the situation so that discretion can be exercised on the basis of an understanding of the child and his situation.

[8] See e.g. testimony in the 1960 Senate hearings (cited *supra* note 6) by Judge E. Barrett Prettyman who noted that his interest in the Juvenile Court was of long standing: as Corporation Counsel twenty-five years previous he had the supervisory function for presentation of cases to Juvenile Court and he participated in the drafting of the 1938 statute now on the books. It was at his suggestion as Chief Judge of the Court of Appeals that the Judicial Conference

fied in the statute, is not confined to an awareness of the offense at hand, but includes evaluation of the juvenile

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of the District of Columbia Circuit appointed a committee, headed by A. Murray Preston, to study the Juvenile Court in a cooperative venture with the Law Enforcement Council of the District of Columbia (Hearings p. 1216).

Asked to comment on the proposal that the authority to waive or retain Juvenile Court jurisdiction be lodged in the United States Attorney, Judge Prettyman stated: "With the greatest deference, but with the maximum vigor with which I am capable, I disagree with it." (Hearings p. 1220). He amplified:

> The statistics of our juvenile court indicate that about one-third of juveniles of ages 16 and 17 years who are charged with committing serious violations of law belong in the first class, that is what might be called hoodlums; about two-thirds are not to be so classified but are children as to whom chastisement of more or less severity will put an end to their difficulties. The great problem, therefore, is to separate the hoodlums from the others. . . . The great outcries to the effect that juveniles of 16 or 17 years of age, who repeatedly commit serious offenses, particularly of the vicious type, ought to be tried publicly and committed to penal institutions, while attractive as headlines, find no dissent so far as I am aware.
>
> How should this separation be made? Obviously, it seems to me, it should be made by the juvenile authorities; that is, by the staff and the judge of the juvenile court. These are the authorities to whom the charge of violation is first presented; these are the ones who are equipped to evaluate juveniles. They are the ones who have the records which indicate whether a given juvenile is a "repeater" or not. Proposals that this evaluation be made by the U.S. attorney or by the district court are wholly unrealistic, to my way of thinking.

In his testimony Mr. Preston submitted the resolution of the Judicial Conference of the District of Columbia Circuit dated November 24, 1959, referred to above, note 6, which urged that the Juvenile Court be strengthened by the appointment of additional judges, elimination of jury trials (a provision unique in the District of Columbia law), and expansion of facilities for treatment of yourthful offenders.

Likewise asked for comment, Mr. Preston also opposed the proposal to transfer waiver authority to the district attorney. He agreed with Chairman Hennings that the prosecutor would be disposed to make his determination on the basis of the offense rather than the individual. (Hearings p. 1237). He stated:

> We believe this decision is by its very nature a judicial one. We do not believe the prosecutor should make it. We do not

and his record, made by the judge with the benefit of the contribution of assistants with special background in the social sciences. The "essence of the juvenile court system is . . . the skill and experience of the specialist judge brought to bear upon young people in trouble." [9]

The purpose of the *Harling* doctrine sinks out of sight if the rule is examined only through the instances where it is applied—for those by definition are the exceptional cases, where the Juvenile Court has waived its jurisdiction. *Harling* is a prophylactic rule, to assure Juvenile

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believe a social worker should make it. We do not think it should be frozen hard into statutory language. The district court does not have the personnel or the organization to make it. It must be made. . . . Now, as the process of waiver is followed now, the opinion of the representative of the prosecutor's office is available to the juvenile court judge when the question is decided by him as to whether waiver should be made or not, and I think that is exactly the way it should be done. . . .

It is partly a question of prosecutive merit, partly a social problem, partly a question of how old he is, partly a question of what is his record in the past, what is the crime involved. The criteria for that waiver have been very carefully worked out.

* * * *

We think that the juvenile court judge is the only person and the logical person to make this decision.

The waiver criteria of the Juvenile Court were made public by its Policy Memorandum No. 7, November 30, 1959. See 1960 Hearings, *supra* note 6, at p. 1175-76.

The location of responsibility in the Juvenile Court under the District of Columbia Act is underscored by the fact that in the Federal Juvenile Delinquency Act (*supra* note 5) passed in 1938, Congress placed the separation responsibility in the Attorney General. 18 U.S.C. § 5032. In that situation, of course, there are no federal juvenile courts available with specialized staff and machinery for an immediate investigation of the background of the offender.

[9] *Kent* v. *United States*, 119 U.S. App. D.C. 378, 343 F.2d 247 (1964), *cert. granted*, 381 U.S. 902 (1965).

To be eligible for appointment as a judge of the Juvenile Court a person must have "a broad knowledge of social problems and procedure and an understanding of child psychology." 11 D.C. Code § 1502 (1964 Supp.). The word "broad" was inserted by the 1963 amendment.

Court treatment for the cases where it may yield beneficial results to society. The juvenile courts do not fight delinquents, but delinquency. The sorting out of the waiver cases on the younger side of the general line of jurisdiction is the task assigned to the broad gauge of the judge and not to the prosecutor or the police force. The Juvenile Court's broad exclusive original jurisdiction reflects the experience that a delinquent's capacity for rehabilitation can not be conclusively determined by the seriousness of his offense.[10]

The prosecution in effect invites us to consider the particular circumstances of Harrison's confession and to carve an exception to *Harling* that will embrace these circumstances.[11] This suggestion reflects an attitude that is contrary to the statement and policy of *Harling's* broad exclusion of statements, though voluntary, elicited from a minor still within the exclusive jurisdiction of the Juvenile Court. It may be worthy of mention that the prose-

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[10] This is the experience gleaned from cases of thousands of delinquents, according to Judge Paul W. Alexander of Toledo, Ohio, a noted authority, as set forth in his article "A Brief Reintroduction to the Juvenile Court," 50 A.B.A.J. 353, 354 (1964).

[11] Defense counsel likewise urges us to consider the particular facts of Harrison's confession, urging, as an alternative argument, that those facts call for an application of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). He argues that the absence of counsel at the time of the statement renders it inadmissible, and that it was only the absence of counsel alert to the consequences of the felony murder rule which enabled the police officer to extract a confession by reassuring Harrison that the police appreciated that the killing was only an accident. Escobedo likewise denied all knowledge of the crime until confronted by an accomplice, and likewise sought to exculpate himself through a fact which would be considered meaningful by a layman, but lacked sufficiency as a legal defense.

Harrison did not request counsel. There are varying views as to whether an adult offender must request counsel in order to invoke *Escobedo*. Compare *People* v. *Dorado*, —— Cal. 2d ——, 398 P.2d 361 (1964), *cert. denied*, *California* v. *Dorado*, 381 U.S. 937 (1965); *Russo* v. *New Jersey*, —— F.2d ——, 33 LW 2621 (3d Cir. May 20, 1965); with *People* v. *Gunner*, —— N.Y.2d ——, —— N.E.2d ——, March 11, 1965 (N.Y.L.J. July 22, 1965, p.1); *Tracy* v. *Commonwealth*, 33 LW 2620 (Mass. Sup. Jud. Ct., April 26, 1965).

We do not reach this *Escobedo* question.

cution's presentation to this court bypasses entirely the group police questioning of Harrison at Police Headquarters on March 8, 1960, when he was kept overnight at the Receiving Home.[12] The prosecution would presumably agree that *Harling* would have required exclusion of Harrison's confession if obtained March 8, or 9, due to the exclusive jurisdiction of the Juvenile Court. The *Harling* rule, like the Juvenile Court's jurisdiction and the noncriminal approach which it protects, depends on age at the time of the offense. The Juvenile Court's exclusive jurisdiction of this offense was in no way impaired by the fact that prior to March 21, the date of the admissions, Harrison turned eighteen, became subject to the jurisdiction of the criminal courts as to other offenses, and was committed to jail for traffic violations. The law conceives that society as well as the youths involved will benefit by maintaining the availability of a juvenile de-

[12] Officer Short testified that he arrested Harrison on March 8, 1960. He was accompanied by several other police officers. Harrison was taken to Police Headquarters, where he was questioned concerning the death of Brown in a room assigned to Homicide Squad. Harrison insisted that he knew nothing about it. Short stated there were ten officers present, and beginning to list them he concluded, "I guess, the whole squad were there." He first referred to this session as lasting only three or four minutes, but upon further questioning indicated the questioning may have lasted even longer than fifteen minutes. Efforts by defense counsel to probe the length of this questioning were cut off by the trial court.

Officer Schwab testified that on the afternoon of March 8, 1960, he questioned Harrison in the presence of Detective Coppage (not listed by Officer Short) for about four or five minutes at the Robbery Squad of the Detective Bureau at Police Headquarters; that he advised Harrison "of the seriousness of the offense and his rights"; that he "started questioning him as to what he knew about this case"; that Harrison "told me he did not have to talk to me at all and that I could go to hell"; and that Schwab then "got up and walked away from him."

The sequence of these two questionings is not clear from the record. In any event, Harrison was taken downstairs after the questioning, was put in a big cell for some time, and was then taken to the Receiving Home. He spent the night at the Receiving Home and the following morning, March 9, was taken back to No. 1 Headquarters by the police. The prosecution witnesses stressed his reappearance March 9, because they wanted to establish that his photograph, a Government exhibit, was taken on that date.

linquency approach, sparing those who lacked maturity of judgment when under eighteen, and may not have fully appreciated the consequences of their acts, from the stigma of criminality for the rest of their lives, and encouraging them, with changed environment and under proper supervision, to become law-abiding citizens.[13]

A root problem sidestepped by the prosecution is the unfairness inherent in any use of the confession in a criminal case despite the inability to provide basic conventional criminal safeguards.[14] The prosecution could not promptly take Harrison before a magistrate for a preliminary hearing pursuant to Rule 5. It was a week before the Juvenile Court ruled on waiver. The prosecution would in effect consign Harrison to limbo, with his awkward age making him too young for the protection afforded adults, but too old for the protection of the exclusive Juvenile Court jurisdiction.

We cannot agree that this unjust and anomalous result is compelled by the use of the word "charged" in the Juvenile Court Act, that the Act precludes the application of the *Harling* rule so long as the police elicit the statement from a juvenile under interrogation before the

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[13] In view of this policy the Federal Juvenile Delinquency Act has been held applicable to proceedings begun after the eighteenth birthday, even though that statute, unlike ours, does not expressly establish juvenile delinquency jurisdiction in such cases. *United States* v. *Fotto*, 103 F.Supp. 430, 431 (S.D.N.Y. 1952); *United States* v. *Webb*, 112 F.Supp. 950, 951 (W.D. Okla. 1953); *United States* v. *Jones*, 141 F.Supp. 641, 643 (E.D. Va. 1956).

[14] The following trial colloquy is illuminating:

> THE COURT: Of course, hindsight is always better than foresight. It might have been better if they had waited until the waiver before they went down and talked to him at the jail.
>
> MR. SMITHSON: Your Honor, I really can't say that, because they knew he was then an adult.
>
> THE COURT: He was what?
>
> MR. SMITHSON: He was over the age of 18.
>
> THE COURT: Let us assume he was an adult. Then he should have been brought before a magistrate, should he not?
>
> MR. SMITHSON: But not for a crime committed while he was a juvenile.
>
> THE COURT: I think this is a very close case.

charge is formally filed in court. In *Harling*, as here, the excluded statement was obtained before the defendant was formally charged in court. Just because an alleged offender is a juvenile, and most vulnerable, does not mean that the police become entitled not only to interrogate without any need to observe Rule 5, which generally requires arrested persons to be brought before a committing magistrate without unnecessary delay, but also to testify fully as to the minor's statements in the event of a criminal trial after waiver. The *Harling* opinion makes clear that the non-criminal Juvenile Court Act approach is exclusive "from the moment a child commits an offense." This view is in accordance with the Congressional instruction that the provisions of the Juvenile Court Act establishing this legislative court "shall be liberally construed" to accomplish the rehabilitative purposes of the law.[15]

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[15] 11 D.C. Code § 903 (1961), now consolidated with § 902 and transferred to 16 D.C. Code § 2316 (1964 Supp.).

There are three independent and complete answers to any suggestion that there are "jurisdictional" barriers to this liberal construction directed by Congress:

(1) The Juvenile Court, like other District of Columbia legislative courts, rests on the authority of Congress under Article I (sec. 8, cl. 17) of the Constitution, and is not controlled by the "case or controversy" concept applicable to Article III courts. *Keller* v. *Potomac Elec. Co.*, 261 U.S. 428, 442-43 (1923); *O'Donoghue* v. *United States*, 289 U.S. 516, 546 (1933).

(2) If necessary there would be no difficulty in delineating an "anticipatory jurisdiction" in the Juvenile Court overseeing treatment of the juvenile between arrest and formal charge. Compare *Ex parte United States*, 287 U.S. 241 (1932), where the Supreme Court, exercising its authority to issue writs in aid of jurisdiction, 28 U.S.C. § 1651, mandamused a district judge in order to protect an eventual jurisdiction it might never exercise. Though there is no criminal "case or controversy" until a crime is formally charged, even a constitutional district court has an anticipatory equity jurisdiction in advance of indictment to "reach forward" to control or prevent improper preparation of evidence by United States Attorneys, or law enforcement officers, through unconstitutional searches and seizures. See *Smith* v. *Katzenbach*, —— U.S. App. D.C. ——, —— F.2d ——, No. 19230, decided September 3, 1965, slip opinion pp. 8-11, and cases discussed therein. See also Rule 41(e), Federal Rules of Criminal Procedure.

(3) It suffices here to say that a court is discharging an important judicial function when it excludes statements that are

The prosecution argued that the *Harling* rule unduly discourages Juvenile Court waivers. We asked for available judicial statistics which, though not part of the record on appeal, are properly before us in view of our superintendent power over the administration of justice in the local courts.[16] The data indicate that the Juvenile Court properly does not regard the prosecution's reference to a *Harling* problem as barring waiver.[17]

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offered in court notwithstanding failure of police to observe the limitations applicable to the taking of such statements prior to the time the court's jurisdiction formally attached. A person is fairly said to be "within" or "under" a court's jurisdictional protection though technically the courts jurisdiction attaches only when a charge is filed in court, and prior thereto he is only "subject to" the invocation of that jurisdiction. Compare Judge Holtzoff in *United States* v. *White*, 153 F. Supp. 809, 811 (D.D.C. 1957), that a juvenile arrested for an offense is "then under the jurisdiction of the Juvenile Court" and hence Rule 5 is inapplicable.

For a person questioned for acts that would bring him within the original criminal jurisdiction of the district court the limitation on questioning includes the requirement of prompt arraignment, and failure to observe that limitation requires exclusion of the statement. *Mallory* v. *United States*, 354 U.S. 449 (1957).

For a person questioned for acts that would bring him within the exclusive original jurisdiction of the Juvenile Court, the matter is non-criminal, in the absence of a waiver, and hence is not governed by the rules and limitations established for criminal cases. The implied limitation on such questioning is that statements are deemed taken for use solely before the Juvenile Court.

[16] See *Fisher* v. *United States*, 328 U.S. 463, 476 (1946); *Griffin* v. *United States*, 336 U.S. 704, 712-18 (1949); compare *Jones* v. *United States*, 105 U.S. App. D.C. 326, 328, 266 F.2d 924, 926 (1959).

[17] The Government's data show that between October 1962, and June 1965, the United States Attorney recommended against waiver as to 123 offenders because of the *Harling* exclusionary rule (sometimes accompanied by other problems) and that in 24 instances the Juvenile Court waived the case notwithstanding.

In these 24 cases, there were 4 instances where presentment to the grand jury was declined, 5 cases were ignored by the grand jury, and there were 3 directed verdicts of acquittal and 12 convictions.

Apparently no effort was made to follow the possibility referred to in *Harling*—that the district court retain the waived case but exercise the powers conferred on the Juvenile Court, as expressly

In any event, *Harling* rests on fundamental considerations of fairness and protection of the Juvenile Court approach. It prohibits the admission against Harrison in a new trial of his statement of March 21, 1960.

WASHINGTON, *Senior Circuit Judge*: I concur in the result for the reasons given in my separate concurring opinion in the decision of the original division in this case.

DANAHER, *Circuit Judge*, with whom WILBUR K. MILLER, *Senior Circuit Judge*, and BURGER and TAMM, *Circuit Judges*, join, dissenting: In Part III, C, *supra* of the opinion of a majority of the original sitting division,[1] the facts appear in some detail and will here be mentioned only briefly. The exact chronology is important, however, particularly as it illustrates how in my view the *en banc*

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permitted by D.C. Code § 11-914. For an instance where the district court did elect to sit as a juvenile court, see the order of Judge Youngdahl reported in *United States* v. *Anonymous*, 176 F.Supp. 325 (D.D.C. 1959). District courts generally have jurisdiction of juvenile delinquency proceedings under the Federal Juvenile Delinquency Act. 18 U.S.C. § 5301 et seq.

The impact of *Harling* is a qualitative matter, and little illumination is provided either by the data filed with us or by the published statistical reports of the Juvenile Court. We have examined the latter and note that there are no data relating waivers to referrals for particular offenses. Total figures for the period October 1962—June 1965, show some 235 cases waived out of approximately 2600 referrals subject to waiver determination. These figures are rounded; the number of referrals should be increased if any significant number of the 240 complaints for "damage to property" and "possession of weapons" are ascribable to felony charges. The data include over 900 referrals for unauthorized use; the Juvenile Court's report for 1964 (p. ii) says these overstate the number of offenses since the report lists five referrals for unauthorized use if five boys are found joyriding in a car earlier stolen by one of them.

[1] The three judges who first heard this case decided to reverse the convictions of Harrison and his co-defendants White and Sampson on grounds set forth in the division's opinion, *supra* p. 3. On the point at issue here, Senior Circuit Judge Miller and Circuit Judge Danaher joined in affirming the ruling of the trial judge. Circuit Judge Washington dissented on this score.

majority opinion has inverted the applicable statute[2] and has failed to recognize the narrow holdings of the *Pee*[3] case and the *Harling*[4] opinion.

The result is that my colleagues of the majority will not allow the Government to offer in evidence at a new trial Harrison's own voluntary oral statements that he planned with others to rob "Cider" Brown, arranged for a getaway car, brought along a sawed-off shotgun for use in executing the felony, and then all but literally blew the head off his victim.

My colleagues so decide on the ground that at the time of the murder, the "child" Harrison was only 17 years 11 months and 20 days old. Therefore, they say, he was disabled after he became 18 years of age from voluntarily outlining the several inculpatory steps even though he had not yet been charged with the murder offense and hence was not before the Juvenile Court or any other court on that account.

I. *The Facts Here Pertinent.*

Brown was murdered on March 8, 1960.

Harrison became 18 years of age on March 18, 1960.

Harrison on March 18, 1960 was arrested and charged with speeding.

Harrison on March 19, 1960 was sentenced to jail on the traffic charges.

Harrison on March 19, 1960 was charged in the Court of General Sessions by one Edith Penn with breaking and entering her apartment and with larceny. Harrison waived hearing and was committed to jail to await grand jury action.

Harrison as of March 19, 1960 had not been charged in the Juvenile Court with any of the foregoing offenses.

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[2] D. C. CODE § 11-907 (1961), hereinafter referred to in Part III, *infra*. The pertinent Code sections appear in footnote 1 of the *en banc* majority opinion.

[3] Pee v. United States, 107 U.S.App.D.C. 47, 274 F.2d 556 (1959).

[4] Harling v. United States, 111 U.S.App.D.C. 174, 295 F.2d 161 (1961).

In the early morning hours of March 21, 1960, White and Sampson signed confessions of their complicity in the "Cider" Brown felony. They implicated Harrison.

About 7:30 A.M. on March 21, 1960, White and Sampson at the jail were brought into confrontation with Harrison. They told Harrison in detail just what they had said to the officer.

Harrison thereupon, on March 21, 1960, during that confrontation, uttered the statements now said by the majority to be inadmissible. Only thus and on that day did the police secure the evidence upon which they later "charged" [5] Harrison.

Harrison on the afternoon of March 21, 1960, for the first time was charged in the Juvenile Court, the police complaint having been based upon what he said had been his part in the slaying of Brown.[6]

II. *The Majority Holding.*

My colleagues state their holding thus:

> "Under the governing rule laid down by this court, en banc, in *Harling* v. *United States*, 111 U.S.App. D.C. 174, 295 F.2d 161 (1961), the admissions made March 21, may not be received in evidence in the criminal proceeding in District Court."

The *Harling* opinion which I joined will be mentioned in Part IV hereof, but I note now that it is completely distinguishable. Harling, age 17, had been arrested and *had been charged* with robbing and stabbing his victim. In that case we carefully defined our issue thus:

> "The principal question concerns the admissibility of testimony by Government witnesses of damaging oral statements made by appellant while in police custody *when he was seventeen years old* and before the Juve-

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[5] The officers later that morning but by noontime secured from Harrison a written confession which in our earlier opinion had been ruled inadmissible, and it is not here involved.

[6] The fact that the Juvenile Court on March 28, 1960 waived its jurisdiction is irrelevant to our issue.

nile Court had waived its 'original and exclusive jurisdiction.' D.C. Code, § 11-907." [7] (Emphasis added.)

Let us first test the applicability of the statute by reference to its terms.

III. *The Statute to be Applied.*

The solicitude of our law for true juveniles who have been charged with crime is well described by Judge Leventhal. But it surely is so that not every youthful person under 21 is a ward of government, and even more certain that the Juvenile Court has no jurisdiction whatever over any such person unless there be presented to that court "cases" or "proceedings." The statute does not give that court jurisdiction over offenses, but over *persons charged* in some case.

The statute gives that court original and exclusive jurisdiction "of all cases and in proceedings" concerning "any person under 21 years of age *charged with having violated* any law . . . prior to having become 18 years of age . . . ." (Emphasis added.) D.C. CODE § 11-907 (1961).

It is fundamental to our law that, absent a case or controversy, the Judicial branch has no jurisdiction.[8] That is also the plain concept of the Juvenile Court Act. Only when a person under 21 has been charged with an offense committed prior to his becoming 18 can the Juvenile Court acquire "original and exclusive jurisdiction" of such "cases" or "proceedings." [9] And so, "in the case of a child

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[7] 111 U.S.App.D.C. at 174, 295 F.2d at 161.

[8] Muskrat v. United States, 219 U.S. 346, 356 (1911); United States v. Choate, 276 F.2d 724, 728 (5 Cir. 1960). An accused, even a juvenile, must be properly before the court. Ex parte Bain, 121 U.S. 1, 13 (1887). So here, unless the Juvenile Court's jurisdiction shall have been invoked pursuant to the Act, there can be no proceeding. See Pee v. United States, *supra* note 3, 107 U.S.App. D.C. at 50, 274 F.2d at 559.

[9] And similarly if one sixteen years of age or older "*is charged* with an offense" which would be a felony if committed by an adult, the Juvenile Court may, in prescribed circumstances, waive its "jurisdiction." D. C. CODE § 11-914 (1961).

sixteen years of age or older *charged* with a felony, the Juvenile Court may either proceed with the case itself or waive its jurisdiction." [10] (Emphasis added.)

Yet the holding of our majority colleagues would bar Harrison's post age 18 statements even though he had not yet been charged in any court with the March 8 homicide. Carried to its ultimate conclusion, the court's ruling would exclude Harrison's admissions even if he had not been apprehended until he was twenty one. Surely the Congress never contemplated any such absurd result when it provided exceptional treatment for juvenile offenders, charged in the Juvenile Court.

I wish to dissociate myself from any such reading and application of a statute intended simply to define the jurisdiction of the Juvenile Court. Rather it seems clear to me that Juvenile Court jurisdiction over Harrison adhered *only* when on the afternoon of March 21, Harrison for the first time was charged in the Juvenile Court with Brown's murder.[11]

IV. *The Holdings in the Harling* [12] *and Pee* [13] *Cases.*

In the *Harling* case the accused, aged 17, had been arrested on the evening of February 21, 1960. Thereupon, having been identified by a clerk at a lineup as one of two persons who had robbed a store and had stabbed the clerk, the accused was placed in the Receiving Home overnight, questioned at the Robbery Squad the next morning, and later that afternoon, was further identified, this time by the store owner. The latter at the trial testified that when she identified Harling, he admitted in the presence of officers that he had taken part in the robbery but denied that he had stabbed the store clerk. Defense counsel objected on *Mallory* grounds to a detective's testimony concerning Harling's earlier statements to the same effect.

[10] Pee v. United States, *supra* note 3, 107 U.S.App.D.C. at 50, 274 F.2d at 559.

[11] And see note 6, *supra*.

[12] *Supra* note 4.

[13] *Supra* note 3.

The trial judge overruled the objection on the ground that Rule 5 and the *Mallory* doctrine did not apply to juveniles.

We pointed out that the Federal Rules of Criminal Procedure do not apply in juvenile proceedings which are purposely flexible, informal and essential if the Juvenile Court is to administer its *parens patriae* function.

> "To avoid impairment of this function, the juvenile proceeding must be insulated from the adult proceeding. *This requires that admissions by a juvenile in connection with the non-criminal proceeding be excluded from evidence in the criminal proceeding.* We hold this requirement applicable in this case and in all similar cases in the future." [14] (Emphasis added.)

Obviously the instant case is not even remotely "similar."

The holding of the *Harling* case stemmed directly from the procedures created by our Juvenile Court Act to serve the best interests of a "child" who had been charged with the commission of crime before reaching the age of eighteen. Once charged, and once within the jurisdiction of the Juvenile Court, the juvenile would be subject to its procedures, depending upon whether the Juvenile Court retained that jurisdiction or waived the accused over to the District Court.

Harrison was not so charged, nor had he been *held under the auspices of the Juvenile Court.* He was already in jail pursuant to *adult* charges when confronted by his confederates. He was free to talk, and he did so. I submit that the only way the majority can assert that *Harling* bars such voluntary statements is by their now saying what *Harling* does not say. *Harling* actually says that if admissions *"obtained in juvenile proceedings"*

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[14] 111 U.S.App.D.C. at 177, 295 F.2d at 164. Thus a majority of this court joined in the *Harling* ruling.

Moreover we *expressly* refrained from an intimation for views as to whether we would deem admissible, in an adult criminal trial spontaneous statements by a juvenile if those statements had not been made in the course of the permissible itnerrogation authorized by the Juvenile Court Act. *Ibid.* That question was not then before us.

before *"waiver of jurisdiction"* may be introduced in an adult proceeding after waiver, *"the juvenile proceedings"* are made to serve as an adjunct to and part of the adult criminal process. (Emphasis added.) 111 U.S.App.D.C. at 177, 295 F.2d at 164.

Even the reasoning of *Harling* belies the majority's present interpretation, as will be seen from the explanation in *Edwards* v. *United States*.[15]

In that case this court said:

> "The *Harling* case bars the Government from using against an accused in a criminal trial a confession or admission officially obtained from him *when he was a juvenile detained under the auspices of the Juvenile Court*, where the latter court has subsequently waived its jurisdiction and transferred the accused for trial to the District Court. Our ruling in *Harling* resulted from the special practices which follow the apprehension of a juvenile. He may be held in custody by the juvenile authorities—*and is available to investigating officers*—for five days before any formal action need be taken. There is no duty to take him before a magistrate, and no responsibility to inform him of his rights. . . . *Harling* is a simple recognition that it would be unfair to the individual juvenile and a mockery of the juvenile system to allow unrestricted use of evidence, *gathered through such procedures*, in the adult court." [16] (Emphasis added.)

My colleagues say that the *Harling* opinion finds its foundation in *Pee* v. *United States*, *supra*. As pertinent here, that case involved three appellants seventeen years of age or younger who had been charged in the Juvenile Court with serious felonies. Held for two weeks under jurisdiction of the Juvenile Court before the cases were waived to the District Court, the accused had made statements to the police. As the *Edwards* case, *supra*, demonstrates, under Juvenile Court procedures but for Juvenile

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[15] 117 U.S.App.D.C. 383, 330 F.2d 849 (1964).

[16] *Id.* at 384-85, 330 F.2d at 850-51.

Court purposes *only*, a person there charged is actually made "available to investigating officers."

So it was that this court held that such statements, so elicited, which could have been received in juvenile proceedings, were erroneously admitted against the appellants in the District Court trial after waiver. Judge Prettyman explained:

> "Thus, in the case of a child sixteen years of age or older *charged with a felony*, the Juvenile Court may either proceed with the case itself or waive its jurisdiction." [17] (Emphasis added.)

The *Pee* case does not hold that a juvenile can not commit a crime. It does not hold that a person more than 18 years old can not effectively admit that he did commit a crime before he was 18. No such result can be attributed either to our cases or to the statute.

On the contrary, the statute contemplates as *Pee* makes evident, that a "child" is exempt from criminal processes and the results of a criminal trial *only* when he has been proceeded against as a juvenile. So it is that once *charged* with a felony, a person over 16 may be proceeded against in the Juvenile Court; that court may waive its jurisdiction over the person so that a case may go forward in the District Court; and the latter may determine either to exercise Juvenile Court powers exactly as would the Juvenile Court, or apply the usual federal criminal procedure. And if the latter course be decided upon, statements elicited from the juvenile while detained after he had been charged under the auspices of the Juvenile Court, may not be used against him at the criminal trial in the District Court.

That is all that the *Pee* case was talking about. It is all that *Harling* said. That is what *Edwards* explains. I decline to find in those cases or in the statute any basis whatever for what the majority now holds.[18]

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[17] Pee v. United States, *supra* note 3, 107 U.S.App.D.C. at 50, 274 F.2d at 559. And see the text of D. C. CODE § 11-914 (1961) at set forth in note 1 of the majority opinion.

[18] The *en banc* majority observes in its note 11 that it does not "reach this *Escobedo* question." Of course it does not, for logically

I am unable to agree that a jurisdictional statute is to be so construed as to disable one over 18 not previously charged, from voluntarily stating that he was a murdering robber before he was eighteen. I think such evidence under the circumstances herein reviewed should be deemed competent.

So, I respectfully dissent.

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there can be no *Escobedo* problem if the majority is otherwise correct in its contention that Harrison's jail statement is to be barred because of his juvenile status.

In any event the *Escobedo* holding by its own terms is definitely limited and could have no applicability here. See Cephus v. United States, —— U.S.App.D.C. ——, —— F.2d —— (No. 18669, decided June 21, 1965), concurring opinion, slip op. 6; *rehearing en banc denied*, October 5, 1965.

Again, in Jackson v. United States, 119 U.S.App.D.C. 100, 104, 337 F.2d 136, 140 (1964), we commented specifically that "If there were a rule that a confession may not be received *if made by an accused without counsel*, that would be the end of this case—and of scores like it." Certiorari was denied, 380 U.S. 935 (1965).

[fol. 96]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 365-60

UNITED STATES OF AMERICA

vs.

EDDIE M. HARRISON ORSON G. WHITE,
JOSEPH R. SAMPSON, DEFENDANTS

Washington, D. C.
Tuesday, May 3, 1966.

The above cause came on for further trial before THE HONORABLE EDWARD M. CURRAN, United States District Judge, and a jury, at 10:00 a.m.

Appearances:

For the Government:

DAVID EPSTEIN, ESQ.
Asst. U.S. Attorney

For Defendant Harrison:

GEORGE J. THOMAS, ESQ.
ALFRED V. J. PRATHER, ESQ.

For the Defendant White:

WILLIAM A. DAVIS, ESQ.

For the Defendant Sampson:

HAROLD F. GOLDING, ESQ.

* * * *

[fol. 99] MR. EPSTEIN: At this time, Your Honor, we will read from additional testimony given at a previous proceeding by Eddie MacArthur Harrison, a defendant in this case.

I shall read first from the direct examination where the defendant Harrison was questioned by his counsel.

MR. THOMAS: I object to the reading of this testimony.

THE COURT: Overruled.

MR. EPSTEIN: (Reading:)

"Question. Will you state your name?

"Answer. Eddie MacArthur Harrison.

"Question. And you have been at the D. C. Jail for several years, is that correct?

"Answer. Yes, sir."

This testimony was given on May 3rd, 1963.

"Question. Did you know George Brown?

[fol. 100] "Answer. Yes, I did.

"Question. Did you have occasion to see George Brown on March 8th, 1960?

"Answer. Yes, I did.

"Question. First, Mr. Harrison, how old were you on March the 8th, 1960?

"Answer. Seventeen.

"Question. And when did you become 18 years of age, if you know?

"Answer. March the 18th.

"Question. Of what year?

"Answer: 1960.

"Question. Now, you stated that there came a time when you saw George Brown on March the 8th, 1960, is that correct?

"Answer. Yes, sir.

"Question. Now, tell us, how did that come about?

"Answer. On March the 8th of 1960 I went to his house. I went to his house once or twice that morning. The first time I went to his house no one answered the door, so I went to Orson White's house; and when I came from his house, I went to Joseph

[fol. 101] Sampson's house. After I went to Joseph Sampson and Orson White's house, we went to Mr. Brown's house.

"Question. Now, why did you go to Mr. Brown's house?

"Answer. I told Sampson to take me up to Fourth and R Streets where Mr. Brown lived."

MR. THOMAS: I object.

MR. GOLDING: I object on that.

THE COURT: What are you objecting about?

MR. THOMAS: He is not reading—

THE COURT: He is not reading the transcript?

MR. THOMAS: I'm sorry, Your Honor. I made a mistake.

MR. EPSTEIN: Now, on page 1308, where the direct examination is continued:

"Question. Now, Mr. Harrison, speak loudly. Now, at the close, just before the close of the session of Friday, this past Friday, I think the last question that was asked of you was whether or not you had gone to the residence of the premises of 1713 Fourth Street, Northwest, and in particular I asked you whether you had gone to where George Brown was, [fol. 102] and I believe you answered that you had two times, on March the 8th, 1960, is that correct?

"Answer. Yes, sir.

"Question. Now, let me divert from there and ask you this: Did there come a time on March the 8th when you were taken into custody by the police?

"Answer. Yes, sir, there did."

On page 1334:

"Question. Now, to go back now, Mr. Harrison, to the 8th of March, te morning of the 8th of March, 1960, you testified earlier that you saw George Brown two times on that—you went to his premises—

"Answer. I went to his house.

"Question. —to his premises two times that day. How did you come to go there the first time?

"The Court. How did he come to go where?

"Mr. Thomas. Well, I have identified he went to the premises 1713 Fourth Street, Northwest on the morning of March the 8th, 1960.

[fol. 103] "Question. How did you happen to go there the first time on that morning?

"Answer. The first time when I left my house that morning I got my shotgun from my house and put it in the car and went up to George Brown's house, but he wasn't there, or no one answered the door. I don't know whether he was there or not.

"Question. And what did you do after that?

"Answer. I went over to Orson White's house.

"Question. And did there come a time when you went back to 1713 Fourth Street, Northwest that morning of March 8th, 1960?

"Answer. Yes, sir.

"Question. Do you remember what time that was?

"Answer. Close to 9:00 o'clock, I think.

"Question. And did you go to George Brown's house?

"Answer. Yes, sir.

"Question. And did you see him?

"Answer. Yes, sir.

"Question. Tell us what happened there.

"Answer. Sampson drove me up in a car. He and [fol. 104] White were in the car. I told Sampson to take me up to Fourth and R Streets, I want to go up George's house.

"Question. You saw George Brown, didn't you?

"Answer. Yes, sir.

"Question. Tell us what happened there?

"Answer. When I went up to his house I went up there and knocked on the door and I didn't hear anything. I knocked on the door again. Someone said, 'Wait a minute,' so I waited.

"Question. Someone said what?

"Answer. 'Wait a minute.'

"Question. From inside the house?

"Answer. Yes.

"Question. All right.

"Answer. Then George came to the door. When he came to the door he pushed the shade and curtain back and looked out of the door. Then he pulled the door open and he saw me and he asked me did I have

anything for him. I told him yes. He said, 'Let me see it, come on in.' So, I had the shotgun in my hand. He asked me to let him see it. I picked it up to let
[fol. 105] him see and was coming in, and he pushed the door in my face and the glass of the door hit the gun and the gun went off.

"Question. Now, was anyone there with you at that time?

"Answer. When the gun went off it knocked me back against the wall and I almost fell on the floor but I didn't fall down.

"Question. The question was, anyone with you at the time this happened?

"Answer. No, sir, nobody was with me.

"Question. Was the defendant White with you at that time?

"Answer. I didn't even know he was there.

"Question. Was he in the car when you left the car that morning to walk up these premises?

"Answer. Yes, sir.

"Question. All right. Now, what happened after the gun went off?

"Answer. After the gun went off I ran out the door.

"Question. Well, now, you have testified here that the effect of the gun going off caused you to fall
[fol. 106] back. Will you tell us about that again?

"Answer. When it went off it surprised and scard me and knocked me back against the wall. There is a wall not too far from the door. And when it knocked me back against the wall I went out the door—I ran out the door, rather. And White was out on the steps and I almost ran into White on the steps.

"Question. And you ran away, is that correct?

"Answer. Yes, sir.

"Question. Now, did you go there with the intent to rob George Brown that morning?

"Answer. No, sir, I didn't plan on taking anything from him.

"Question. Why did you go there?

"Answer. To pawn the shotgun to him."

THE COURT: To what?

MR. EPSTEIN: (Reading:)

"To pawn the shotgun to him.

"Question. How long had you known George Brown before March the 8th, 1960?"

MR. THOMAS: Excuse me. On page 1339, the second line, you read that, "To pawn the shotgun to him."

[fol. 107] MR. EPSTEIN: "To pawn the shotgun to him again."

MR. THOMAS: Would you read the question and the answer, Mr. Epstein?

MR. EPSTEIN: Yes, sir.

"Question. Why did you go there?

"Answer. To pawn the shotgun to him again.

"Question. How long had you known George Brown before March 8th, 1960?

"Answer. For about a year or two years; something like that.

"Question. Had you ever done any of that kind of business with him before that?

"Answer. Pawning something with him?

"Question. Yes.

"Answer. Yes, sir.

"Question. Did you go there that morning to see George Brown with intent to use that gun to hurt him?

"Answer. No, sir."

This is the cross-examination by the prosecutor.

"Question. Mr. Harrison, you told us you were on two occasions to George Brown's house in the morning of March 8th, 1960, and, yet, you further [fol. 108] told us that when you saw the police officers on the afternoon of March the 8th of 1960, you told them you knew nothing about the death of George Brown, didn't you?

"Answer. Yes, sir.

"Question. Tell me, sir, did you make any report to any police officers about this death?

"Answer. I didn't know he was dead then.

"Question. You saw him hit?

"Answer. No, sir.

"Question. I see. You just ran from the noise?

"Answer. I ran when the glass broke, and I heard the boom.

"Question. I see. And you knew it was George Brown's place on 1713 Fourth Street that the officers were talking to you about on the 8th, did you not?

"Answer. Yes, sir, I knew they were talking about that.

"Question. And you told them nothing?

"Answer. No, sir.

"Question. You didn't tell them it was an accident then?

[fol. 109] "Answer. No, sir."

MR. THOMAS: Your Honor, may counsel come to the bench?

(AT THE BENCH:)

MR. THOMAS: Your Honor, I am going to object to his reading any further testimony there that has to do with any questions that he was asked or answered to the police.

MR. EPSTEIN: I intend to skip that.

THE COURT: He is going to skip that.

MR. THOMAS: Yes, but you just read a few.

MR. EPSTEIN: That was before anything had taken place.

MR. THOMAS: It had to do with his talking to the police.

Would you be careful about that, Mr. Epstein? Thank you.

Thank you, Your Honor.

(IN OPEN COURT:)

MR. THOMAS: Your Honor, would you permit counsel to come back once more?

(AT THE BENCH:)

MR. THOMAS: I would ask Your Honor also—this need not refer to the jury—but I would ask Your Honor

[fol. 110] to strike any questions and answers read by Mr. Epstein that had to do with what he told the police or what he was asked by the police.

MR. EPSTEIN: Your Honor, the question I read was before he had been arrested and had nothing to do with the questioning. It was denials by him.

MR. THOMAS: I understand that.

MR. EPSTEIN: I don't think the Court of Appeals decision goes to the point—every statement of the Court of Appeals decision goes to statements that were made after they were arrested before unnecessary delay.

MR. THOMAS: This is a case where he was under juvenile jurisdiction at the time, and he is actually reading questions and answers—

THE COURT: What question are you talking about?

MR. THOMAS: Your Honor, he read the last few questions.

THE COURT: Let's see what it is.

(Pause)

THE COURT: (Reading:)

"Question. Tell me, sir, did you make any report to any police officer about his death?

"Answer. I didn't know he was dead then.

[fol. 111] "Question. You saw him hit?

"Answer. No, sir.

"Question. I see. You just ran from the noise?

"Answer. I ran when the glass broke, and I heard the boom.

"Question. I see. And you knew it was George Brown's place on 1713 Fourth Street that the officers were talking to you about on the 8th, did you not?

"Answer. Yes, sir, I knew what they were talking about.

"Question. And you told them nothing?

"Answer. No, sir.

"Question. Didn't you tell them it was an accident?

"Answer. No, sir."

MR. THOMAS: The point I am making, Your Honor

THE COURT: There is no incriminating statement.

MR. THOMAS: But I just ask Your Honor to preclude his reading any further.

THE COURT: He said he wasn't going to read it.

MR. EPSTEIN: I am not going to read it.

[fol. 112] MR. THOMAS: Thank you, Your Honor.

(IN OPEN COURT:)

MR. EPSTEIN: On page 1355:

"Question. Now, this shotgun that you allegedly took to George Brown's to pawn, what time of the day did you first go to George Brown's?

"Answer. Early in the morning, about 7:00 o'clock, somewheres, it was early.

"Question. Early?

"Answer. Yes, sir.

"Question. And did you say you went back a second time?

"Answer. Yes, sir.

"Question. On this particular occasion, after some wait, George Brown opened the door and looked to see who was there.

"Answer. That's right.

"Question. And that door, sir, of his premises, opens inward, from the vestibule into the home, is that correct?

"Answer. That's right. If you are inside you have to pull it open.

"Question. I see. And he asked you what you [fol. 113] had, and you had the shotgun?

"Answer. That's right.

"Question. Now, you were carrying this shotgun, sir, loaded?

"Answer. It was, but I didn't know it was loaded.

"Question. You didn't know it was loaded?

"Answer. No, sir.

"Question. You didn't bother to check to see if it was loaded?

"Answer. No, when I got it back from him he must have loaded it.

"Question. You didn't bother to check to see if it was loaded?

"Answer. No, sir.

"Question. Tell me, you had it in the car, bouncing around in the back of the car?

"Answer. Yes, sir, when I got it out I threw it on the floor.

"Question. How long had you had this gun?

"Answer. How long I had had it?

"Question. That's right.

"Answer. Maybe two, three years.

[fol. 114] "Question. Two or three years?

"Answer, That's right. I had it, it stayed in my house a long time.

"Question. And it had been bouncing around in the back end of your car that particular day, too, is that correct?

"Answer. I didn't notice it was bouncing, but it must have been.

"Question. Well, let me ask you this, sir: Where did you park this particular vehicle when you went into George Brown's house the second time?

"Answer. I didn't park it; I wasn't driving.

"Question. You weren't driving? You had left Sampson to drive the car so you could leave in a hurry, is that correct?"

MR. THOMAS: Now, just a moment. I am going to object to the tone. When he reads direct he reads it with a soft tone. When he reads the cross-examination he reads it with a strong and forceful and even with emphasis, and I object and I ask Your Honor to direct the prosecutor to read it in the same tone of voice as he reads the direct, and I ask you to instruct the jury to disregard the tone that he has used.

[fol. 115] THE COURT: Very well, disregard the tone. Use the same tone.

MR. THOMAS: Thank you, Your Honor.

MR. EPSTEIN: (Reading:)

"Question. You weren't driving. You had left Sampson to drive the car so you could leave in a hurry?

"Answer. I don't understand, 'so he could leave in a hurry.'

"Question. You had been driving this same car earlier that morning at six or seven o'clock when you went there, is that correct?

"Answer. Yes, sir.

"Question. But you just casually gave it over to Sampson to drive while you allegedly went to pawn the gun?

"Answer. No, I let Sampson drive because I didn't have a permit to drive.

"Question. But you had been driving it that morning?

"Answer. Yes, sir.

"The Court. You were 17 years old at the time?

"The Witness. Yes, sir.

[fol. 116] "The Court. And you had had this gun for two or three years?

"The Witness. Not actually had it, my uncle left it in my house, and it's been in my house.

"The prosecutor.

"Question. And, of course, you were familiar with the proper manner of carrying a rifle or a shotgun?

"The Witness. I don't understand what he means.

"The Prosecutor.

"Question. Let me put it to you a little more explicitly, Mr. Harrison. Did you carry the gun, sir, as you walked from the car, parked a distance away from Mr. Brown's place, in your hand, with the barrel pointed out, up the street?

"Answer. Yes, sir.

"Question. Just carried it casually in the palm of your hand at your side, is that correct?

"Answer. Yes, sir.

"Question. In full view?

"Answer. Yes, sir.

[fol. 117] "Question. And when you got to the door, sir, you were asked for this shotgun by Brown, to let him see it, is that correct?

"Answer. That's right.

"Question. Then, sir, would you mind telling the ladies and gentlemen of the jury why you raised it to the level of almost six feet to show it?

"Answer. Yes, sir. When I was going to the door and he was slamming the door in my face, I tried not to let the gun hit the window, to keep it from breaking it, but it did.

"Question. So, sir, the gun was at your side and he asked to see it, and you raised it up and pointed at a six-foot level, sir, is that your testimony?

"Answer. No, sir.

"Question. Then, sir, I put it to you that if the door was closing on the gun, if it were at your side, as you have allegedly testified, the easier movement is not up but backward, isn't that correct?

"Now, sir, you have testified that you told Samp-
[fol. 118] son to drive you to Fourth and R Street, Northwest, on that date?

"Answer. Yes, sir.

"Question. And your friend White was with you at that time in the car?

"Answer. That's right.

"Question. And therefore they knew where you were going, to George Brown's?

"Answer. I don't know whether they knew I was going there; I told them to take me to Fourth Street.

"Question. But they knew they were going to Fourth and R Street, is that correct?

"Answer. Yes, sir.

"Question. And when you fled from the scene, you fled and were picked up in this car?

"Answer. Yes, sir.

"Question. And actually, sir, you fled right behind Orson White, isn't that correct?

"Answer. I ran into Orson down on the steps.

"Question. Is it not a fact, sir,"—

MR. GOLDING: I am going to object.

MR. THOMAS: May counsel come to the bench?

[fol. 119] THE COURT: What do you want now? I am not going to have bench conferences every ten minutes.

MR. THOMAS: Your Honor, I feel this ought to be stated out of the hearing of the jury. It is a question of law.

THE COURT: Very well.

(AT THE BENCH:)

MR. THOMAS: Your Honor, the reading of this testimony now, this particular last group of questions has to do with statements taken that were used by Mr. Smithson from the statements taken from these defendants, and he is basing his questions—

MR. EPSTEIN: That is not ture.

MR. THOMAS: Well, he is basing his questions on the statements he had in his possession, and I think it is quite clear in there that that is what he is doing because Mr. Harrison was the first man to take the witness stand and he was questioned on the basis of that, and I feel that that testimony indicates that pretty clearly.

THE COURT: Well, here are the questions:

"Question. Now, sir, you have testified that you told Sampson to drive you to Fourth and R Street, Northwest on that date?

[fol. 120] "Answer. Yes, sir."

He has already testified before that he had.

"Question. And your friend White was with you at that time in the car?

"Answer. That's right.

"Question. And therefore they knew where you were go9ng, to George Brown's?

"Answer. I don't know whether they knew I was going there; I told them to take me to Fourth Street.

"Question. But they knew you were going to Fourth and R Street, is that correct?

"Answer. Yes, sir.

"Question. When you fled from this scene, you fled and were picked up in this car?"

MR. THOMAS: Now, that has to come, that has to come from the fact that they had their statements, Your Honor.

THE COURT: I don't know.

MR. THOMAS: Well, I say I think you can conclude from that—I think Mr. Epstein would agree there were confessions from every one of these young men, and it has to be intermingled in the questioning of this witness, Your Honor. It has to be there. I don't think you can [fol. 121] get away with it. And of course that is a violation of the principles of law that have been set down—I forget the particular case. I know Your Honr is very familiar with it. It has to do with the fruits. And that is what is actually going through here. In other words, he is using the fruits of these confessions taken to make his cross-examination.

MR. EPSTEIN: Your Honor, defense counsel—

MR. THOMAS: Because he leads up to the statements and then he goes into it after he cross-examines. He goes into the statements themselves in order to—I believe it is the Silverthorne case, Your Honor; it's been a long time since I looked at it, but I believe it is the Silverthorne case that I am referring to that used the words fruit of the forbidden tree.

THE COURT: There is no way of me determining from the questions that they were obtained from a statement.

MR. THOMAS: Well, Your Honor, the question there, you were later picked up in a car, there was no testimony by Harrison about that.

THE COURT: Where is this later picked up in a car?

"Question. And when you fled from the scene, you fled and were picked up in this car?

"Answer. Yes, sir."

[fol. 122] MR. THOMAS: There is no testimony about that in the front, on direct examination there is no testimony, I think, on that point.

MR. EPSTEIN: But White has testified to that, to the car, picking them up.

MR. THOMAS: I am talking about Harrison's testimony.

THE COURT: Well, leave it out if there is anything obtained on cross-examining Harrison as a result of statements given by Harrison, I think you ought to leave them out.

MR. EPSTEIN: Well, Your Honor, right here, the next question that I was going to ask is:

> "Is it not a fact, sir, that you heard his cross-examination"—referring to White's—"wherein he stated that in September of 1960 he had stated that he was on the vestibule besides you when you fired that gun?"

That was what counsel was immediately objecting to.

Now, that is a fact. The defendant Harrison was in the same courtroom and heard the cross-examination of the defendant White with reference to the location of the various people when the gun was fired. I can't see how counsel can argue that that is the result of any statement.

MR. THOMAS: He is building up a set of questions [fol. 123] for the purpose of using—he is using what he already knows from the confessions to set up questions for the purpose of using the confession to contradict or impeach later on.

THE COURT: That particular question couldn't be, because White testified he was there; and he testified while Harrison was in the courtroom, didn't he?

MR. THOMAS: Yes, he did.

THE COURT: I see nothing wrong with that particular question.

But if there are questions that are going to be asked as a result of information obtained by the statements, of course, that cannot be.

MR. THOMAS: At this point, Your Honor, I am going to move that all of the—I don't know how I can do otherwise than move that all of the testimony that has been read on the cross-examination—

THE COURT: That is denied. Let's proceed.

MR. EPSTEIN: How am I instructed to proceed?

THE COURT: I wouldn't ask him any more questions if those questions were asked as a result of information obtained by statements. You know it, I don't, because I haven't read the transcripts and I haven't read the statements.

[fol. 124] MR. EPSTEIN: I have read all that material, Your Honor, but—

THE COURT: I am not going to go all through that. There is no sense taking any chances. You will get reversed again.

MR. EPSTEIN: There was testimony by White with respect to the car.

THE COURT: That is already in.

MR. EPSTEIN: All right.

THE COURT: So you don't have to ask Harrison about it.

MR. EPSTEIN: Well, but, Your Honor, that is the point. Harrison, therefore, had to explain when he took the stand—

THE COURT: I will sustain the objection. Let's proceed. Don't overtry it.

(IN OPEN COURT:)

MR. EPSTEIN: Question on 1362:

"Question. Is it not a fact, sir, that you heard his cross-examination—

"And actually, sir, you fled right behind Orson White, isn't that correct?

"Answer. I ran into Orson down on the steps.

[fol. 125] "Question. It it not a fact, sir, that you heard his cross-examination wherein he stated that in September of 1960 he had stated that he was on the vestibule besides you when you fired that gun?

"Answer. No, sir.

"Question. You don't recall that?

"Answer. No, sir. He was outside on the steps; he wasn't in there."

On page 1364—

MR. THOMAS: There is testimony that runs after the last question and answer on 1363, Mr. Epstein. There is testimony there.

MR. EPSTEIN: Would counsel like to stay here and advise me which portions of the testimony he wants?

MR. THOMAS: Page 1363, you read down to the third line and then you didn't continue.

MR. EPSTEIN: Your Honor, I understood counsel to be objecting.

THE COURT: That is what I thought, too. Would you make your mind up what you want in?

MR. THOMAS: All right.

MR. EPSTEIN: I will be glad to continue, Your [fol. 126] Honor, but I thought I was following the Court's ruling on counsel's objection.

MR. THOMAS: No, I prefer him to read that part.

THE COURT: All right, go ahead.

MR. EPSTEIN: Very well.

"Question. And you ran to this car?

"Answer. No, I forgot all about the car.

"Question. You just ran?

"Answer. That's right.

"Question. You were ultimately picked up by Sampson driving this car, is that correct?

"Answer. Yes, sir."

MR. THOMAS: Now I object to anything further.

MR. EPSTEIN: On page 1364:

"Question. Now, on this particular occasion, did you tell Sampson and White that you had shot Brown or discharged the gun up there?

"Answer. No, sir, I didn't know whether he was hit or hurt.

"Question. No, sir, I didn't ask you that. I asked you, did you tell them that you had shot or discharged that gun up there?

"Answer. I don't remember whether I even told [fol. 127] them or not. I think I told them later.

"Question. Had you arranged, when you left the car on Fourth Street, that you would be picked up on Third Street?

"Answer. No, sir.

"Question. Then you can't explain why Sampson would have moved the car, is that correct?"

MR. THOMAS: I am going to object.

MR. EPSTEIN: Would counsel stand here, please and advise me which portions he is going to object to?

MR. THOMAS: You are supposed to know which portions. You have knowledge even better than I do.

THE COURT: You stand there and tell him what you want or he will read the whole of it.

MR. THOMAS: I am reading from here (indicating), Your Honor.

THE COURT: All right. You object to this next question, is that it?

MR. THOMAS: I object to the question and answer he just read involving Sampson's name.

THE COURT: What was the question, again?

MR. EPSTEIN: "Then you can't explain why Sampson would have moved the car, is that correct?"

[fol. 128] MR. THOMAS: That is pretty obvious, Your Honor, where that came from.

THE COURT: I don't know where it came from. You say it's obvious, but it's not obvious to me.

MR. THOMAS: I will just make my objection, Your Honor.

THE COURT: Proceed.

MR. EPSTEIN: (Reading:)

"Question. What did you do with the shotgun?

"Answer. Took it home.

"Question. To your home?

"Answer. Yes, sir.

"Question. Where is it now?

"Answer. I don't know. I put it in the trash bin.

"Question. You put it in the trash bin. where?

"Answer. In my house.

"Question. Let me ask you, sir, on that morning did you call any police precinct or any hospital and notify them that a man might have been injured at 1713 Fourth Street?

"Answer. No, sir, I didn't.

"Question. It didn't concern you?

[fol. 129] "Answer. I guess it did. I can't explain why I didn't. I should have but I didn't."

No further testimony, Your Honor, from this transcript.

THE COURT: Mr. Thomas, have you—

MR. EPSTEIN: May we approach the bench?

MR. THOMAS: I have nothing to read on cross-examination. Thank you, Your Honor.

THE COURT: Very well.

(AT THE BENCH:)

MR. EPSTEIN: Your Honor, that is the Government's case in chief.

I would like to be heard on the issue of lesser included offenses as part of the felony murder. I brought in an authority on the point that recognizes second degree murder.

THE COURT: Denied.

MR. THOMAS: At this time, Your Honor, I move for a directed verdict of acquittal.

THE COURT: That is denied.

Do you move, too?

MR. GOLDING: I do.

THE COURT: That is denied.

[fol. 130] Do you move, too?

MR. DAVIS: Yes.

THE COURT: That is denied.

MR. THOMAS: Your Honor, may I put in my reasons?

THE COURT: Certainly.

MR. THOMAS: Your Honor, the Government has shown none of the elements of robbery in this case, not one.

THE COURT: That is for the jury to decide. They were up there with a shotgun.

MR. THOMAS: But, Your Honor, they haven't shown what I said before, corpus delicti.

THE COURT: I have ruled on that. You put it in the record they haven't proved a prima facie cause, and I have denied it.

MR. THOMAS: Your Honor, I want to renew all the motions made.

THE COURT: All are renewed, and all are denied.

MR. PRATHER: Your Honor, I want to be sure it is understood that the defendant Harrison objects to the use of his testimony on the grounds of the Fifth Amendment.

THE COURT: Yes, I understand all that. The Fifth Amendment has got nothing to do with this case.

MR. PRATHER: Your Honor, he is being compelled [fol. 131-135] to be a witness against himself in this case.

THE COURT: No, he is not. Any time he makes a judicial statement in the court the Government is entitled to use it.

We will take a recess.

(RECESS)

BW fws.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 365-60

UNITED STATES OF AMERICA

v.

EDDIE M. HARRISON

JUDGMENT AND COMMITMENT (REV. 7-52)—
Filed May 20, 1966

On this 13th day of May, 1966 came the attorney for the government and the defendant appeared in person and [1] by his counsel, George J. Thomas and Alfred V. J. Prather.

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] not guilty and a verdict of guilty of the offense of

FIRST DEGREE MURDER WITH
RECOMMENDATION OF LIFE IMPRISONMENT

as charged [3]

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the rest of his natural life, pursuant to the provisions of the Code of Laws of the District of Columbia.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edward M. Curran
United States District Judge

.....

Clerk

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,280

EDDIE M. HARRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,281

ORSON G. WHITE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court
for the District of Columbia

Decided May 18, 1967

Mr. Alfred V. J. Prather (appointed by this court) for appellant in No. 20,280.

Mr. George J. Thomas (appointed by this court) for appellant in No. 20,281.

Mr. Robert Kenly Webster, Assistant United States Attorney, with whom *Messrs. David G. Bress*, United States Attorney, and *Frank Q. Nebeker*, Assistant United States Attorney, were on the brief, for appellee.

Before BASTIAN, *Senior Circuit Judge*, and MCGOWAN and ROBINSON, *Circuit Judges*.

ROBINSON, *Circuit Judge*: Appellants, Eddie M. Harrison and Orson G. White, and a co-defendant, Joseph R. Sampson, were convicted in October, 1960, of the felony-

murder of George H. "Cider" Brown.[1] Death sentences, then mandatory, were imposed.[2] The case submitted by the Government, and accepted by the jury, was that Brown was killed by a blast from Harrison's shotgun in the course of an attempt to perpetrate a robbery espoused by the trio. While an appeal was pending, it came to light that one Daniel Jackson Oliver Wendel Holmes Morgan, a layman impersonating a member of the District of Columbia bar,[3] had represented White and Sampson throughout the trial and Harrison during its post-verdict stages,[4] a discovery that led to a new trial.[5] In April, 1963, appellants and Sampson were again found guilty, the jury recommending life imprisonment for each, to which they were sentenced.[6] These convictions were reversed because statements they had made to police officers had been improperly admitted.[7]

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[1] "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree." D.C. Code § 22-2401 (1961 ed.). Another count, charging Brown's premeditated murder, was dismissed on the Government's motion during the trial.

[2] D.C. Code § 22-2404 (1961 ed.).

[3] See *Morgan* v. *United States*, 114 U.S.App.D.C. 13, 309 F.2d 234 (1962), *cert. denied*, 373 U.S. 917 (1963).

[4] Harrison's trial counsel died before the hearing and determination of his post-verdict motions and Morgan represented him in the ensuing District Court proceedings.

[5] We first remanded in order that each of the three appellants might move for a new trial. After they disaffirmed motions therefor filed by new counsel, we reinstated the appeal and *sua sponte* vacated the convictions with direction that a new trial be awarded. See *Harrison* v. *United States*, 123 U.S.App.D.C. 230, 232-33, 359 F.2d 214, 216-17 (1965).

[6] D.C. Code § 22-2404 was amended in 1962 to authorize these sentences.

[7] See *infra*, note 15.

The third trial, in May, 1966, from which this appeal emanated, was atypical. Since some of the witnesses participating earlier had either died or could not be located, the Government's presentation consisted largely in a reading into evidence of testimony given at the second trial by appellants and the absent witnesses. At the close of its case in chief, the trial judge directed a judgment of acquittal in Sampson's favor but denied similar motions by appellants. Offering no evidence in defense, appellants once more were convicted and, on recommendation of the jury, were sentenced to life imprisonment.

As grounds for reversal appellants urge (a) that they were denied a speedy trial, (b) that the admission of their second-trial testimony was improper, and (c) that there was insufficient evidence that a robbery was in progress when the homicide occurred to convict them of felony-murder. We discuss but reject these contentions, and affirm as to Harrison. The record, however, reveals serious error in the admission at this trial of portions of the testimony White gave at the first trial, and this requires reversal of his conviction.

I

The contention that appellants' Sixth Amendment right to a speedy trial [8] has not been respected is predicated broadly upon the six-year lapse between the homicide and the third trial, but for this purpose we cannot treat litigation spans in a vacuum. "There is no touchstone of time which sets a fixed maximum period that automatically requires application of the Sixth Amendment and dismissal of the indictment." [9] Rather, "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." [10] So in determining whether the delay com-

[8] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S.Const., amend. VI.

[9] *Hedgepeth* v. *United States*, —— U.S.App.D.C. ——, 364 F.2d 684, 687 (1966).

[10] *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905).

plained of assumes constitutional proportions, we examine the circumstances [11] closely to ascertain whether it was "arbitrary, purposeful, oppressive or vexatious." [12]

On the second appeal, appellants pressed a similar claim with respect to the time the case had consumed to that point. We unanimously rejected it for the reasons then expressed and repeated below.[13] Viewing additionally the period since ensuing, we find no reason to now conclude differently.

The present argument focuses upon the interval of approximately two years during which the second appeal was pending. Here undoubtedly is "a spot where the ideal

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[11] "Whether delay in completing a prosecution. . . amounts to an unconstitutional deprivation of rights depends upon the circumstances." *Pollard* v. *United States*, 352 U.S. 354, 361 (1957). See also *United States* v. *Ewell*, 383 U.S. 116, 120 (1966); *Hedgepeth* v. *United States*, *supra* note 9, 364 F.2d at 687; *Smith* v. *United States*, 118 U.S.App.D.C. 38, 41, 331 F.2d 784, 787 (*en banc* 1964).

[12] *Smith* v. *United States*, *supra* note 11, 118 U.S.App.D.C. at 41, 331 F.2d at 787. See also *Pollard* v. *United States*, *supra* note 11, 352 U.S. at 361-62.

[13] "Following their first appeal, they could have been tried in the Fall of 1961 if they had followed this court's original suggestion that they move for a new trial. They refused to do so, and as noted, *supra*, this court, *sua sponte*, was obliged to reinstate the appeals and, on June 12, 1962, to enter an order vacating the original judgments of conviction. That order was filed in the District Court July 3, 1962. The District Court then assigned the case for trial on October 17, 1962. By that date there had been hearings on motions of various court-appointed counsel for leave to withdraw; Harrison had no attorney; Attorney David, appointed October 30, 1962, thereafter sought a continuance contending that he had no transcript of the first trial; Harrison then moved that Attorney David be discharged; motions to dismiss on double jeopardy grounds had been filed and argued; in short, on one basis or other, the District Court was occupied with a series of defense motions, some purportedly of substance, some procedural, but all contributing to delay.

"The unique problems stemming in the first place from Sampson's and White's having engaged the imposter Morgan gave rise to the several dilatory moves. No prejudice in fact was shown. Nor were the 'circumstances' such as to deprive the appellants of constitutional rights." *Harrison* v. *United States*, *supra* note 5, 123 U.S. App.D.C. at 233, 359 F.2d at 217.

crashes head-on with the practical." [14] and appellants' position reflects but scant recognition of the exigencies of appellate review in abnormal cases. That appeal was first argued in December, 1963, before a panel of the court. One of the several difficult questions involved, we decided, was so important as to require determination by the entire court. In June, 1965, the cases were reargued and in December of that year the convictions were reversed. The combinational effect of the panel and *en banc* decisions was to bar from subsequent use all incriminating extrajudicial statements made by appellants.[15]

The time necessarily consumed in unraveling complex issues whose ultimate resolution vindicates the rights of the accused can hardly be said to constitute purposeful or oppressive delay. We are accustomed to careful study of the questions presented to us, particularly where human life or liberty is at stake, and surely this case has tolerated no deviation. "[T]he essential ingredient is orderly expedition and not mere speed"; [16] indeed, "[a] requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." [17] One has but to examine the comprehensive opinions the second appeal brought forth to appreciate the court's task and foresee the risk that unwarranted haste might have worked to

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[14] *King* v. *United States*, 105 U.S.App.D.C. 193, 195, 265 F.2d 567, 569 (*en banc*), *cert. denied* 359 U.S. 998 (1959).

[15] *Harrison* v. *United States*, *supra* note 5. The panel held that written statements taken from the three defendants by police and jail classification officers were banned by *Mallory* v. *United States*, 354 U.S. 449 (1957), and *Killough* v. *United States*, 114 U.S.App.D.C. 305, 315 F.2d 241 (*en banc* 1962), 119 U.S.App.D.C. 10, 336 F.2d 929 (1964). The subject of *en banc* consideration was the admissibility of oral statements Harrison made a few days after his eighteenth birthday but a week prior to waiver to the District Court of jurisdiction over the affair, which occurred while he was a juvenile. The panel held that they had properly been received in evidence but a majority of the full court ruled otherwise on the basis of *Harling* v. *United States*, 111 U.S.App.D.C. 174, 295 F.2d 161 (*en banc* 1961).

[16] *Smith* v. *United States*, 360 U.S. 1, 10 (1959).

[17] *United States* v. *Ewell*, *supra* note 11, 383 U.S. at 120.

appellants' disadvantage. And there is no hint that any subsequent phase of this case radiates any constitutional implication.

Nor do we deem it likely or reasonably possible that appellants could have been prejudiced by the delay.[18] The only concrete suggestion in that direction is that the absence of some of the Government's witnesses and the resulting need to read their prior testimony to the jury precluded additional cross-examination. But appellants had, and utilized, the opportunity to question those witnesses fully during the second trial, and at the third trial they were free to present to the jury the prior cross-examinations but elected not to do so. We are unable to identify any harm to appellants consequent upon the passage of time.

II

At the second trial, after the Government had introduced the post-arrest statements later outlawed on the second appeal,[19] appellants themselves took the witness stand to relate events calculated to establish their innocence. The Government, as part of its case in chief at the third trial, introduced portions of the testimony appellants gave at the second trial. To this appellants register objection, asserting that they testified at the second trial only because the statements had been received in evidence thereat.

The Government's submissions from appellants' second-trial versions did not violate their privilege to remain silent at the third.[20] Nor do the rules authorizing intro-

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[18] See *United States* v. *Ewell*, *supra* note 11, 383 U.S. at 121-23; *Hedgepeth* v. *United States*, *supra* note 9, 364 F.2d at 687.

[19] See *supra* note 15.

[20] *Edmonds* v. *United States*, 106 U.S.App.D.C. 373, 375-78, 273 F.2d 108, 110-13 (*en banc* 1959), *cert. denied* 362 U.S. 977 (1960); *Warde* v. *United States*, 81 U.S.App.D.C. 355, 158 F.2d 651 (1946). Compare *Milton* v. *United States*, 71 App.D.C. 394, 110 F.2d 556 (1940). See also *Orth* v. *United States*, 252 Fed. 569 (4th Cir. 1918); *Heller* v. *United States*, 57 F.2d 627 (7th Cir.), *cert. denied* 286 U.S. 567 (1932); *United States* v. *Grunewald*, 164 F.Supp. 644 (S.D.N.Y. 1958); *People* v. *Corbo*, 17 App.Div.2d 351, 234 N.Y.S.2d 662 (1962); *Rafferty* v. *State*, 91 Tenn. 655, 16 S.W. 728 (1891). See generally McCormick, Evidence, § 131 (1954); Annot. 5 A.L.R. 2d 1404 (1949).

duction of prior-trial testimony feature an exemption of that given by an accused.[21] And while wholesale transcriptive renditions are decidedly less desirable than live evidentiary presentations, we cannot chide the practice where the testimony of witnesses no longer available is indispensable to proof of elements of the Government's case and is confined to that purpose. We are thus brought to appellants' contention that their testimony was involuntary because it was incited by the admission of the subsequently banned post-arrest statements, and on that basis was insulated against prosecutive service at the third trial.

Our federal system bestows upon an accused the choice of testifying or not, and permits what he says from the witness stand to be used against him if not elicited coercively. The record contains no suggestion that the use of the statements at the second trial was a maneuver to wring evidence from appellants; from aught that appears, the Government's sole objective was to supply missing elements of its case. Here, unlike situations where duress of some sort has been found, the Government exerted no pressure,[22] offered no inducement[23] and imposed no improper condition upon appellants' right to muteness.[24] There was uninhibited access to counsel,[25] and so far as we can perceive, complete awareness of legal rights.[26] We have been referred to no case, and our own intensive research has located none, holding that the strength of the Government's case is itself a vitiating form of testimonial compulsion.

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[21] See the cases cited *supra* note 20.

[22] Compare, *e.g.*, *Rock* v. *Pate*, 367 U.S. 433 (1961); *Payne* v. *Arkansas*, 356 U.S. 560 (1958).

[23] Compare, *e.g.*, *Spano* v. *New York*, 360 U.S. 315 (1959).

[24] Compare, *e.g.*, *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Spevack* v. *Klein*, 385 U.S. 511 (1967).

[25] Compare, *e.g.*, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Haynes* v. *Washington*, 373 U.S. 503 (1963).

[26] Compare, *e.g.*, *Davis* v. *North Carolina*, 384 U.S. 737 (1966).

We may profitably resort to an analogy that to us is quite persuasive. If appellants, with their counsel present, and thus presumably cognizant of their prerogatives, had voluntarily spoken extrajudicially, their utterances would have been admissible on the Government's proffer. This would be so, we think it clear, even if the remarks had attempted exoneration in the face of strong or even overwhelming indicia of guilt. We are unable to dissent from these results when, with the same predicates in the case before us, the statements were made at a judicial trial, where appellants were surrounded by the full panoply of legal protections. Their second-trial accounts of the fatal episode lost none of their qualities of admissibility merely because they were rendered in open court or were induced by an evaluation of the capabilities of the Government's proof to convict.

Nor do we consider the re-read portion of appellants' testimony to be proscribed by the familiar "fruit of the poisonous tree" rationale. We may assume, as appellants assert, that had their post-arrest declarations not gotten into evidence at the second trial, they would not have taken the witness stand. The vital inquiry, however, for ascertaining productivity as between the improper admission of the statements and appellants' countervailing testimony is not whether "but for" receipt of the statements the testimony would not have been given, but " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " [27]

There is, we again note, not even a whisper that the Government, in utilizing the statements at the second trial, was motivated by a purpose to elicit a testimonial response from appellants. Moreover, as we have several times held, the testimony of a live witness does not stand on the same evidentiary footing with "an inanimate and

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[27] *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963), quoting Maguire, Evidence of Guilt 221 (1959).

immutable object illegally come by." [28] We have emphasized that the witness "is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give." [29] While his testimony would, of course, be impermissible if obtained by capitalizing on prior illegality,[30] the question is always "how great a part the particular manifestation of 'individual human personality' played in the ultimate receipt of the testimony in question." [31]

Here the role of the "individual human personality," we think, was paramount. What is true of a volitional exercise by a witness whose testimony may be compelled must, absent coercion, be the more so as to an accused who enjoys an absolute privilege to stay silent and, as well, the professional advice of competent counsel as to whether the privilege is to be renounced. Appellants admittedly made a conscious tactical decision to seek acquittal by taking the stand after their in-custody statements had been let in, and the record reflects an appreciable interval for the interaction of mental processes preceding this decision and the testimonial acts themselves.[32] It would be rash to assume that defendants facing the death penalty upon conviction would be unduly influenced to testify favorably to the Government by either the introduction of the prior confessions or their procurement three years previously. In the circumstances here, we deem the

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[28] *Brown* v. *United States*, No. 19890, D.C. Cir., December 30, 1966, at 7. See also *McLindon* v. *United States*, 117 U.S.App.D.C. 283, 285-86, 329 F.2d 238, 240-41 (1964); *Smith* v. *United States*, 117 U.S.App.D.C. 1, 3, 324 F.2d 879, 881 (1963), *cert. denied* 377 U.S. 954 (1964); *Payne* v. *United States*, 111 U.S.App.D.C. 94, 97-98, 294 F.2d 723, 726-27, *cert. denied* 368 U.S. 883 (1961).

[29] *Smith* v. *United States*, *supra* note 28, 117 U.S.App.D.C. at 3, 324 F.2d at 881.

[30] See, *e.g.*, *Smith* v. *United States*, 120 U.S.App.D.C. 160, 344 F.2d 545 (1965).

[31] *McLindon* v. *United States*, *supra* note 28, 117 U.S.App.D.C. at 286 n. 2, 329 F.2d at 241 n. 2.

[32] See *Brown* v. *United States*, *supra* note 28, at 16 (concurring opinion).

relationship between the erroneous admission of appellants' statements and their testimony at the second trial to be "so attenuated as to dissipate the taint." [33]

III

We now scrutinize the evidence to test its legal sufficiency to support Harrison's conviction of felony-murder. The Government's theory, we reiterate, was that he and his co-defendants conspired to rob Brown and that Harrison shot Brown while attempting to consummate the plot. Harrison's retort, made testimonially at the second trial, was that the charge which fatally wounded Brown was fired accidentally as he approached Brown for a loan on his shotgun. Since there were no living eyewitnesses to the shooting save Harrison and possibly White, the Government's case was largely circumstantial.

Shortly after 9:00 a.m. on March 8, 1960, Brown's body was found just inside the front door of his residence. The door, which opened inwardly, was closed, wedged by the body propped face-first against it. The window in the door had been shattered by a force originating externally and there was a hole through the window shade. There were powder burns on Brown's face and the window shade. Brown had died from a wound inflicted by a single blast from a shotgun. The charge had traveled through his head from front to back along an approximately horizontal course veering slightly from right to left.

On the night before the homicide, appellants and Sampson borrowed a black Buick sedan from a friend. About 8:00 o'clock on the next morning—approximately an hour prior to Brown's death—they reassembled in the Buick, and shortly thereafter were linked to the deceased. A Government witness, Thomas Young, seated with Brown in a restaurant that morning noticed Sampson looking at Brown. When Young and Brown left the restaurant, Sampson followed and walked a short distance to a black Buick in which two men were seated. While conversing with Brown, Young saw Sampson talking to the men inside the Buick minutes before Brown drove off alone.

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[33] *Nardone* v. *United States*, 308 U.S. 338, 341 (1939).

It is undisputed that not appreciably later Harrison and his companions arrived at Brown's house in the Buick. One version of the events then transpiring was supplied by Harrison's own testimony. In contemplation of a loan from Brown to be obtained upon a pawn of his shotgun, he had placed the weapon in the Buick earlier that morning, unaware of the fact that it was loaded. Alighting at Brown's house, he removed the shotgun from the car and carried at at his side to Brown's front door. Brown responded to his knock, opened the door and, learning of the transaction Harrison had in mind, said "Let me see it, come on in." Entering, Harrison raised the shotgun from his side in order that Brown might examine it but Brown suddenly pushed the door closed. The glass in the door struck the shotgun and caused it to discharge. Harrison then ran, colliding with White who stood outside on the steps nearby. Both rejoined Sampson in the Buick and together they made off.

But while Harrison's testimony was the largest segment of direct evidence bearing on the affair, the Government's case, and to some extent Harrison's own defense, disclosed circumstances impinging upon the story he related. There is evidence indicating that the shotgun had been aimed at Brown. The shot, fired through the front door window, left a gaping, macerated wound in the right side of Brown's face, and Brown was six feet tall. The trajectory of the charge through Brown's head suggests that the shotgun when fired had not only been raised, as Harrison said, but was in a nearly horizontal position at shoulder level. However this may be, it is immaterial whether the shotgun was discharged intentionally or accidentally if in fact a robbery was then being attempted.[34] And we deem the proof legally sufficient to support a verdict predicated upon the thesis that such was the case.

There was evidence tending to show that both Harrison and White needed money. Harrison proposed to borrow money from Brown. White used marijuana cigarettes, and was unemployed. Admittedly, both had gotten to-

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[34] See *supra* note 1; *Harrison* v. *United States*, *supra* note 5, 123 U.S.App.D.C. at 236 n. 17, 359 F.2d at 220 n. 17.

gether earlier that day to look for a job. Brown had money, and that this fact was known is also clearly suggested. Harrison knew that Brown was a "fence" and had previously dealt with him in that capacity. About $2,000 was found in Brown's pocket after his death. Young testified that he knew that Brown had money on his person that day.

The evidence also indicated circumstantially an intent to rob Brown. Harrison, with White and Sampson, had borrowed an automobile the night before. The jurors could have believed Young's testimony that he saw Sampson at the restaurant and found that he then had Brown under surveillance. They might also have accepted the inference from Young's testimony that appellants were the other two men in the Buick. They could have concluded that something involving appellants and the deceased was afoot.

Harrison approached Brown's residence with a shotgun that was loaded.[35] It was a weapon that could easily have been concealed under his coat.[36] Harrison said that White was with him in the vestibule of Brown's residence when the fatal shot was fired. Sampson concededly remained in the automobile parked nearby. After Brown was shot, neither Harrison nor White stopped to render possible aid, but instead took immediate flight.[37] The jury was not bound to ignore these earmarks of a planned robbery by two co-conspirators with the third standing by with the getaway car. And if the jury rejected Harrison's explanation that the shooting was committed accidentally under innocent circumstances, the evidence was sufficient to support a verdict predicated upon the view that it occurred while a robbery was in progress.

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[35] Compare *Accardo* v. *United States*, 102 U.S.App.D.C. 4, 249 F.2d 519 (1957), *cert. denied*, 356 U.S. 943 (1958).

[36] A Government witness residing across the street from Brown's house saw a male come out of Brown's doorway immediately after the shot "and put something under his coat, a gun, and ran down the street. . ."

[37] See *Miller* v. *United States*, 116 U.S.App.D.C. 45, 320 F.2d 767 (1963); *Hunt* v. *United States*, 115 U.S.App.D.C. 1, 4, 316 F.2d 652, 655 (1963).

The crucial inquiry called for is not whether we ourselves are convinced beyond a reasonable doubt of Harrisons' guilt but whether on the proof adduced the jury legitmately could have been. Our role in making this adjudication "is exhausted when [we determine] . . . that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind." [38] We conclude that as to Harrison it does.

IV

We turn next to considerations peculiarly affecting White. He had taken the stand as a witness in his own behalf at both of the first two trials. During the second trial, the Government resorted to parts of his testimony at the first trial in an effort to cast doubt on what he said at the second, and the portions of his second-trial testimony read to the jury at the third trial included sizeable excerpts from the testimony he had given at the first trial. The fact that he was represented at the first trial by the imposter Morgan spotlights the problem: at the trial from which the instant appeal was taken, the Government's evidentiary presentation embraced testimony White had given at the first trial when he was not represented by a member of the bar.

The Sixth Amendment pledges that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This adjuration necessitates "the guiding hand of counsel at every step in the proceedings against him," [39] including "the giving of effective aid in the preparation and trial of the case." [40] It is clear that these demands are not satisfied when the accused is "represented" by a layman mas-

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[38] *Curley* v. *United States*, 81 U.S.App.D.C. 389, 392, 160 F.2d 229, 232, *cert. denied* 331 U.S. 837 (1947).

[39] *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932).

[40] *Id.* at 71.

querading as a qualified attorney;[41] it is unthinkable that so precious a right, or so grave a responsibility, can be entrusted to one who has not been admitted to the practice of the law, no matter how intelligent or well educated he may be. This is particularly so where, as here, the accused is on trial for an offense upon conviction of which his very life could become forfeit.

Failure to heed the constitutional admonition that the accused enjoy the right to assistance of counsel negates completely the court's jurisdiction to proceed.[42] The proceeding is void, the occurrences therein are vitiated; transpirations otherwise legal go for naught. No less than this was implicit in our disposition of this case shortly after Morgan's deception was uncovered, as we had occasion to observe upon the second appeal.[43]

It cannot be doubted that the Government's introduction into evidence of the statements White made during a period when he was without counsel impinges rights the Constitution renders inviolate. A quarter of a century ago, this Court, in *Wood* v. *United States*,[44] appraised the effect of a denial of the right to counsel upon the accused's privilege against self-incrimination. We held that a withdrawn plea of guilty entered by an uncounseled defendant at a preliminary hearing was improperly received in evidence at the trial and regarded the absence of counsel as a key factor in determining whether the plea was voluntarily entered. Quite recently the Supreme Court, in

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[41] Representation by unlicensed "counsel" was held to deny constitutional rights in *McKinzie* v. *Ellis*, 287 F.2d 549 (5th Cir. 1961); *Jones* v. *State*, 57 Ga.App. 344, 195 S.E. 316 (1938); *Smith* v. *Buchanan*, 291 Ky. 44, 163 S.W.2d 5 (1942); *Jackson* v. *State*, 316 P.2d 213 (Okla. Crim. 1957); *Martinez* v. *State*, 167 Tex.Crim. 97, 318 S.W.2d 66 (1958). See also *Achtien* v. *Dowd*, 117 F.2d 989 (7th Cir. 1941).

[42] *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1939); *Coplon* v. *United States*, 89 U.S.App.D.C. 103, 113-14, 191 F.2d 749, 759-60 (1951), *cert. denied* 342 U.S. 926 (1952).

[43] *Harrison* v. *United States*, *supra* note 5, 123 U.S.App.D.C. at 233, 359 F.2d at 217.

[44] 75 U.S.App.D.C. 274, 128 F.2d 265, 141 A.L.R. 1318 (1942).

White v. *Maryland*,[45] reached the same result through application of the Sixth Amendment to an identical situation, and subsequent decisions have epitomized the Amendment's ban upon evidentiary uses of statements made by an accused at a time when he was entitled to but not accorded the assistance of competent counsel.[46]

The prejudice resulting from admission of White's first-trial testimony is apparent. The strongest evidence at the third trial linking White to the crime was his own testimony at the second trial, without which there is little to place him immediately at the scene of the shooting or to involve him in preparations to rob Brown. Thus it was crucial to the Government's case that White's second-trial testimony be discredited, and in this the impeaching statements from the first trial played a central role.

At the second trial, White stated that he did not know why Harrison wanted to see Brown and maintained that he did not see Harrison place anything into or remove anything from the back seat of the car before Harrison went to Brown's house. The Government countered with testimony that he had seen an object placed on the back seat and that on its removal he had noted that it was a shotgun. White also testified at the second trial that he could not see which house Harrison went into, and was confronted with his previous testimony indicating that he had seen the house. White later testified at the second trial that he did not follow Harrison into the vestibule of Brown's house, and the prosecutor brought forward statements made at the first trial suggesting that he had gone to the vestibule. Finally, White swore at the second trial that he was smoking marijuana on the morning of the homicide and that his senses were confused. The Government responded with White's testimony at the first trial omitting all reference to marijuana or disorientation.

It cannot be doubted that the impact of White's first-trial statements upon his second-trial assertions of innocence and his credibility was devastating. Four material

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[45] 373 U.S. 59 (1963).

[46] *Massiah* v. *United States*, 377 U.S. 201 (1964); *Escobedo* v. *Illinois*, *supra* note 25; *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

aspects of his story were impugned: that he did not know that Harrison had a shotgun, that he was initially unaware of the fact that Harrison went to Brown's house, that he was not in the vestibule when the shotgun was fired, and his mind was befuddled by marijuana. And each of the damaging statements had been elicited on White's direct examination by Morgan, his erstwhile protector.

We are unable to find any exception which would eliminate this situation from a conventional application of the governing constitutional mandate. Certainly none is created by the fact that White originally offered the statements for exculpatory purposes since they were ultimately used to incriminate.[47] Nor were they "sweeping claim[s]" [48] on "collateral matters" [49] so "remote from the issue of guilt" [50] as to fall within the principle authorizing impeachment by an otherwise inadmissible statement in limited and guarded circumstances.[51]

We have noted that there was only a general protest on broad constitutional grounds to the admission of any of White's previous testimony at the third trial rather than objection directed specifically to the portions we find inadmissible or to the reasons we have stated.[52] And we are naturally reluctant to reverse the conviction of a defendant three juries have found to be guilty. But neither of these considerations permits us to ignore serious and

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[47] See *Miranda* v. *Arizona*, *supra* note 46, 384 U.S. at 444; *Wong Sun* v. *United States*, *supra* note 27, 371 U.S. at 487.

[48] *Walder* v. *United States*, 347 U.S. 62, 65 (1954).

[49] *Tate* v. *United States*, 109 U.S.App.D.C. 13, 17, 283 F.2d 377, 381 (1960).

[50] *Carter* v. *United States*, No. 20,091, D.C. Cir., March 2, 1967 at 2. See also *Bailey* v. *United States*, 117 U.S.App.D.C. 241, 328 F.2d 542, *cert. denied* 377 U.S. 972 (1964); *Barkley* v. *United States*, 116 U.S.App.D.C. 334, 335-36 n. 1, 323 F.2d 804, 805-6 n. 1 (1963).

[51] See cases cited *supra* notes 48 to 50. See also *Inge* v. *United States*, 123 U.S.App.D.C. 6, 356 F.2d 345 (1966); *Johnson* v. *United States*, 120 U.S.App.D.C. 69, 344 F.2d 163 (1964); *Brown* v. *United States*, 119 U.S.App.D.C. 203, 338 F.2d 543 (1964).

[52] See F.R.Crim.P. 51.

harmful error [53] of constitutional proportions [54] involving the admission of harmful evidence in a capital case.[55]

V

There is no occasion for extending to Harrison the ruling just made as to White. Harrison was represented by a competent, licensed attorney at the first trial until some point after the evidence was all in.[56] Moreover, none of Harrison's testimony at that trial was used or referred to at the second trial, so nothing therefrom got before the jury at the third. The factual predicates for our disposition as to White are entirely lacking as to Harrison.

White's first-trial statements, however, read to the jury at the third trial, implicated Harrison to the extent we hereinafter mark. On this account, we have pondered the question whether this requires reversal of Harrison's conviction. We have decided, for reasons now to be explained, that it does not.

We might rest our conclusion in this regard upon an application of the principle that evidence not inherently untrustworthy having relevance to the guilt of an accused is not excludable simply because it was elicited in violation of the rights of another.[57] Nonetheless, we have ex-

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[53] See *Oliver* v. *United States*, 118 U.S.App.D.C. 302, 335 F.2d 724, *cert. denied* 379 U.S. 980 (1964); *Williams* v. *United States*, 105 U.S.App.D.C. 41, 263 F.2d 487 (1959); *Mills* v. *United States*, 97 U.S.App.D.C. 131, 228 F.2d 645 (1955); *Robertson* v. *United States*, 84 U.S.App.D.C. 185, 171 F.2d 345 (1948).

[54] *United States* v. *Atkinson*, 297 U.S. 157 (1936); *Kohatsu* v. *United States*, 351 F.2d 898, 901 n. 4 (9th Cir. 1965), *cert. denied* 384 U.S. 1011 (1966).

[55] F.R.Crim.P. 52(b). See also *Naples* v. *United States*, 120 U.S.App.D.C. 123, 128, 344 F.2d 508, 513 (1964); *Stewart* v. *United States*, 101 U.S.App.D.C. 51, 247 F.2d 42 (1957).

[56] See *supra* note 4.

[57] See *Long* v. *United States*, —— U.S.App.D.C. ——, 360 F.2d 829, 834 (1966); *Bowman* v. *United States*, 350 F.2d 913, 916 (9th Cir. 1965), *cert. denied* 383 U.S. 950 (1966); 8 Wigmore, Evidence § 2270 (McNaughton rev. 1961); McCormick, Evidence § 73 (1954). Compare *Jones* v. *United States*, 119 U.S.App.D.C. 284, 342 F.2d 863 (*en banc* 1964).

panded our investigation broadly enough to satisfy ourselves that White's re-read concessions could not have prejudiced Harrison. White's first-trial statements could have persuaded findings that Harrison transported a shotgun in the Buick and that he took it with him to Brown's house, but these events were not disputed by Harrison. Nor could White's testimony as to whether he was smoking marijuana on the day Brown died have affected detrimentally Harrison's accounts of what occurred at Brown's doorway.

There remains, then, only the query whether Harrison could have been harmed by White's first-trial admission that he was in the vestibule of Brown's house when the shotgun erupted. The jury at the third trial heard the testimony Harrison gave at the second trial that he was alone in the vestibule at the time and in his flight collided with White a short distance outside on the steps. We recognize that this discordance may have had some tendency to undermine Harrison's credibility and to suggest a common scheme to rob, but we assess its proclivities in either respect as trivial. The verdict as to Harrison was sustainable quite apart from any element of conspiracy, to which White's earlier statement could only weakly and tangentially contribute. And Harrison's testimony conflicted seriously with that of others, and mirrored its own internal inconsistencies and gaps at a number of crucial points. We are unwilling to say that its slight incompatibility with White's, viewed in the light of other more serious evidentiary variations and uncertainties, warrants a jury's evaluation of Harrison's criminal responsibility for the fourth time.

We affirm Harrison's conviction. As to White, we reverse and remand for a new trial.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1966

Criminal 365-60
No. 20,280

EDDIE M. HARRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Criminal 365-60
No. 20,281

ORSON G. WHITE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court for the District of Columbia.

Before: Bastian, Senior Circuit Judge, and McGowan and Robinson, Circuit Judges.

JUDGMENT—Filed May 18, 1967

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court:

(1) that in case No. 20,280 the judgment of conviction as to Eddie M. Harrison is affirmed; and

(2) that in case No. 20,281 the judgment of conviction as to Orson G. White is reversed, and this is remanded to the District Court for a new trial.

Per Circuit Judge Robinson

Dated: May 18, 1967

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1966

Criminal 365-60
No. 20,280

EDDIE M. HARRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Before: Bazelon, Chief Judge; and Danaher, Burger, Wright, McGowan, Tamm, Leventhal and Robinson, Circuit Judges, in Chambers.

ORDER—Filed August 1, 1967

On consideration of appellant's petition for rehearing *en banc*, it is

ORDERED by the court *en banc* that appellant's aforesaid petition is denied.

Per Curiam.

Statement of Chief Judge Bazelon why he believes the petition for rehearing *en banc* should be granted.

BAZELON, *Chief Judge:* At a previous trial of defendants,[1] the Government introduced several of their incriminating statements. The defendants testified in their own behalf. They were convicted, and on appeal we reversed and remanded for a new trial on the ground that the statements had been illegally obtained.[2] At the new trial

[1] Defendants' first conviction was vacated because one of them was represented at trial by a layman representing himself as an attorney. Reference to defendants' previous trial is to their second trial.

[2] 123 U.S.App.D.C. 230, 359 F.2d 214 (1965).

now under review the defendants did not testify, but the Government read into the record sections of their testimony at the prior trial. They were again convicted. In this appeal, the court rejected their contention that their testimony was inadmissible since its purpose was to rebut the illegally obtained statements.[3]

Although the court assumes that the defendants would not have testified at the prior trial if their illegally obtained statements had not been introduced, it holds that there was no evidence of governmental duress in the form of "pressure" or "inducement" to compel the defendants to waive their Constitutional right to remain silent. And the court also holds that the prior-trial testimony itself was not the "fruit of the poisonous tree," because the defendants were "individual human personalit[ies] whose attributes of will, perception, memory, and volition interact[ed] to determine what testimony [they would] give." *Smith and Bowden* v. *United States*, 117 U.S.App.D.C. 1, 324 F.2d 879 (1963).

It seems plain to me, however, that the defendants' decision to testify was compelled by the need to rebut the statements erroneously admitted in evidence. In *Griffin* v. *California*, 380 U.S. 609 (1965), the Supreme Court held that adverse comment by the court or the prosecutor upon a defendant's failure to testify "cuts down on the [Constitutional] privilege [to remian silent] by making its assertion costly." In the present case, the cost of exercising the privilege was even greater. The erroneously admitted statements left the defendants with a "Hobson's Choice": remain silent and allow the jury to consider the highly damaging statements, or testify and seek to rebut them. Neither time, nor the benefit of counsel, for considering this choice could alleviate the "damned-if-you-do-damned-if-you-don't" alternative.[4]

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[3] As to one of the appellants, however, the court reversed the conviction on other grounds. Only appellant Harrison petitions for rehearing en banc.

[4] In *Edmonds* v. *United States*, 106 U.S.App.D.C. 373, 273 F.2d 108 (1959) (en banc), the introduction of prior-trial testimony was approved. But there the testimony in question was not given in response to evidence illegally obtained and admitted.

Because I think the decision to testify was compelled, it is unnecessary to consider the questions of attenuation reached by the court.[5] I would grant the petition for rehearing en banc.[6]

Circuit Judge Wright would grant appellant's petition for rehearing *en banc* and concurs with the statement of Chief Judge Bazelon.

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[5] In any event, *Smith and Borden* and its progeny are inapplicable since they involved witnesses who were not defendants and thus there was no question of testimonial compulsion.

[6] Compare *People* v. *Polk*, 63 Cal.2d 443, 406 P.2d 641, 47 Cal. Rptr. 1 (1965), *cert. denied*, 384 U.S. 1010 (1966) (Traynor, C.J.).

SUPREME COURT OF THE UNITED STATES

No. 563 Misc., October Term, 1967

EDDIE M. HARRISON, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for a writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 876 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

December 4, 1967

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